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N. J. Court of Errors and Appeals.

Between— RALPH G. PACKARD, Appellant, and THE BERGEN NECK RAILWAY COMPANY, Respondent.	Argument for Respondent.

The Bergen Neck Railway Company condemned a right-of-way over salt marsh of Ralph G. Packard, in area 1 89-100 acres. Pending condemuation proceedings he dredged a canal through the soft mud, from New York Bay, which was near by, across the right-of-way and also across East 28th street, a street opened on paper by the City of Bayonne, from the west line of Avenue G westerly to Avenue A, but not graded or capable of bearing a horse, on Mr. Packard's land, and ending in the marsh. This street is fifty feet wide. The right-of-way is one hundred feet wide and embraces the land on both sides of the street at its terminus and includes all the land on which the street abuts at its east terminus. The street is a *cul de sac* running into the right-of-way and stopping there. Neither Avenue G nor Avenue H is an opened street. No opened street exists connecting with the eastern terminus of East 28th street (case 55, 1 32 to 40.) There is ample room for one, if not for two tracks to

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be placed on the right-of-way without either crossing the street or encroaching on it. Mr. Packard without authority from the City of Bayonne, dug his canal one hundred and fifty feet wide, across both railway route and street. An award was made to him of three thousand dollars for the value of his land and two thousand dollars for his damages which award was filed March 13th, 1890. On appeal the jury gave him seventeen thousand dollars, May 2nd, 1890, in view of the destruction of his canal scheme—the company avowing a design to obstruct it, Mr. Packard dwelling on its value to swell damages, and the Court sending the case to the jury on that theory. The Court gave Mr. Packard the full benefit of his canal as a *bona fide* enterprise including what was done pending condemnation proceedings and refused to consider whether it was not a mere device to swell damages, although the excavation on the right-of-way was made pending the condemnation proceedings (39, l. 30 to 40). Even with this extravagant verdict Mr. Packard was not content, and he seems to have resolved to bring the railroad company to his terms by the aid of the City Council, which was induced to attempt to deliver the company into his hands. He applied, May 6th, 1890, to the Bayonne Council to vacate a number of streets named in his petition, most of which had never been opened, and for leave to grade East 28th street and to erect a draw-bridge over the canal at a point where the entire draw-bridge would stand at the end of the street within the right-of-way of the Bergen Neck Railway Company. Such a structure would prevent a crossing of the street by the railway either at or above grade, and the draw, when open, would blockade the tracks that might be laid outside of the street on the right-of-way. By studying the map it will be made clear that a railroad bridge spanning the street must have supports in the canal or street; if excluded from support in both the canal and street, it would be an immense and expensive structure, in fact taking

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the curve into account, a practical impossibility. The council put through a resolution to permit such grading and drawbridge the same evening, without notice to the company. After long and futile negotiations for a settlement, during which Mr. Packard covertly pushed on his scheme (p. 38, l. 20 to 40), the company paid the award into the Court of Chancery September 27th, and entered on the land September 29th, and undertook to drive piles and lay tracks on that part of its way not included in the street (p. 40, l. 1 to 30). This attempt was resisted by Mr. Packard and an injunction to prevent his interference was asked for and granted, and a counter injunction sought by Mr. Packard was denied.

1. The Railway Company has a Clear Legal Title.

The land has been taken by due process of law, under a title which relates back to March 13th 1890, the date of filing the Commissioners' Report, which operates as a conveyance.

Hetfield v. Cent. R. R. of N. J. 5 Dutch. 571, 573, 574;
North Hud. R. R. v. Booraem, 1 Stew, 450, 454.

By force of the statute (Rev. 928 § 100) the Commissioners' Report is plenary evidence of the company's right to the land, and the owner's right to sue for the money and it is made a mortgage on the land until paid. In other words the right and liability are *vested* by the report; and the appeal supplies no new title or record, but merely varies the amount of the debt. In Taylor v. N. Y. & L. B. R. 9 Vr. p. 28, the question of the time when the R. R. Co. acquires title is considered and the Ch. J. said, " After the filing of survey

and the ascertainment of compensation the owner cannot divest or impair the interest thus acquired;" and the Court says that while it is true that possession is deferred until payment, yet the owner cannot encumber the tract taken or alter its condition after award and before payment, and that the cutting of trees on the right-of-way, if useful for the construction of the railroad, is a tort by the owner. The validity of the proceedings to condemn cannot be here questioned.

State, M. & E. R. R. v. Hud. Tunnel R. R., 9 Vr. 548, 550, 552.

The right of payment into Court under the Act of 1877 (Rev. Suppl. 128) as a tender, is disputed by appellant but without reason.

The title of the act shows to what proceedings it refers. The words in the second section are, "any law or act aforesaid;" that is, any such law as is mentioned in the title. Defendants would have us read it "law or act *last* aforesaid," but that is not the fair reading. The interpretation we contend for has long been given to the act and many titles have been acquired under it. This interpretation was given to the act by the Chancellor in Platt v. Bright, 4 Stew 81, 86, where it was also held that apart from the statute the power was inherent in the Court. In Johnson v. B. & N. Y. R'y. Co. 18 Stew. 454, 456, the same interpretation was given and also the Chancellor in Currie v. Jersey City, Newark & Western Railway Co., affirmed on appeal: in that case this interpretation was necessary to the decree of the Chancellor which gave the company a qualified possession. The propriety or manner of the exercise of thepower is not reviewable collaterally.

2. The Rights of the City in the Street do not avail Appellant.

Of course the city cannot pretend to interfere with that part of the right-of-way not within the street lines. East 28th street is opened technically (not actually) to the west line of Avenue G but neither Avenue G nor Avenue H is opened at all. This is admitted in the answer (p. 55, l. 32 to 40). As to East 28th street itself, we have important and vested property rights. The company has the right by law to enter on the street to construct a crossing above or below grade or at grade with the leave of the council, perhaps without it. Rev. p. 929, § 102. Where two public highways meet, each must yield to the other as much as is requisite. J. City v. Morris Canal, 1 Beas. 548, 564. The company has also rights in the street as an abutting owner on both sides and at the terminus of the street and it has acquired all Packard's rights in the street for the purpose of constructing the railroad. These rights stand as acquired March 13th, 1890. The owner has had damages assessed to him on the theory of a crossing of East 28th street, at an elevation of about six feet above high water, which is about the proposed grade of the street. If the company changes its plan and passes at a different elevation the owner can claim further damages if any are sustained. Carpenter v Easton & Am. R. R., 9 C. E. G. 249. Appellant claims however that he may enjoin us from crossing at grade because we have not obtained leave so to cross from the city, as required by the railroad act (Rev. 929, § 102). The Vice Chancellor suggests the inquiry whether a street which has never been graded or travelled is a "street or highway" within the terms of the general railroad law (Rev. 929, § 102). But admitting that a grade crossing will require leave of the city, how does this concern Mr. Packard? He is not

an abutting owner on East 28th street at the point of crossing, nor does that part of the street which lies within the right-of-way give access to or from any part of his land. If he has the right to interfere with the construction of the railway across that street, then every person in Bayonne has the right. He has no peculiar interest in the public use of East 28th street which warrants him in entering on the right-of-way and forcibly interfering with the construction of the railway.

Dodge v. P. R. R. 16 Stew. 351.

But there is another reason why the appellant has no standing to urge the city's rights in the street, in order to preserve his canal. The company has room to construct a railroad on its right-of-way without touching East 28th street, and it was this part of the construction in which they were engaged when appellant attempted to interfere. (See affidavit of Slater, pp. 39 and 40). He was protecting not the street, when he resisted the construction, but his canal, outside the street, on the right of way. If it should be necessary for the company to construct above t e grade of the street that would not prevent them from filling the rest of their right-of-way with a solid structure and thus blockading the canal. See accompanying map. Mr. Packard therefore has no interest to prevent a grade crossing of the street to save his canal for a crossing of the street above grade would not save it and he has no right to operate a canal on the right-of-way of the railroad.

2. The Resolutions of the Council do not Avail Appellant.

Mr. Packard claims a right to obstruct the railroad by virtue of resolutions of the Council of Bayonne

applied for by him and passed May 6th, 1890, authorizing him to grade East 28th street and erect and maintain a draw-bridge therein.

This action of the Council was void for many reasons.

(a) The Resolutions are Void Because Grading can be Authorized by Ordinance Only.

Charter of Bayonne, § 40 and § 62 ;
State, Story, Pros. vs. Bayonne, 6 Vr. 335, 337.

The power to make a street improvement implies power to permit a private owner to make it, but such permission must be granted by ordinance.

Hunt vs. Lambertville, 16 Vroom, 279, 282.

(b) The Resolutions Authorize an Unlawful use of the Street.

The construction of a private canal across a public opened street is a nuisance. It was so held by Judge Dixon in the condemnation appeal (Case p. 22, l. 20 to 30) and the proposition is evident. The canal being a nuisance, a draw-bridge to accommodate it would be a nuisance. The Council could no more authorize such a bridge than a bridge in a street where there is nothing to cross. The bridge proposed by the resolutions is twenty-five feet wide ; the rest of the street is left to the exclusive use of the canal. The City Council cannot thus give away or narrow its streets. A vacation or change of boundaries must be by a formal procedure and assessment of damages (Charter P. L. 1872, p. 726, § 51). The street must be not less than forty feet wide (Charter

P. L. 1872, p. 717, § 61). The Council can not permit such private use of the street. In Hutchinson v. Board of Health, 12 Stew. 269, permission to an individual to lay a private sewer in a street was held void and was restrained by injunction. The whole scheme is child's play except as a means of extortion. Why should the city want a bridge to run into the railway route and stop there? How is Mr. Packard a private owner to be held to "maintain" a draw-bridge? How is it to be constructed, at what grade placed and who shall work it? Power to build bridges does not include draw-bridges. The city has not power to make such a bridge itself, much lesss to empower a private owner to do so. It cannot create either a canal franchise or a bridge franchise.

(c) The Resolutions are Void for Want of Notice to the Bergen Neck Railway Company.

The company was under a vested liability to pay the verdict rendered May 2nd and was entitled to the land with rights relating to March 13th, 1890. On May 6th the application of Mr. Packard was presented and at once granted.

The city owns the land in East 28th street for a street only. The Railway Company owns it for a railroad. Neither the city nor Mr. Packard can apply the property of the company to the new use of a canal or a draw-bridge, without compensation. The resolutions were void for want of notice to the railway company and the defect is jurisdictional.

Hutton v. Camden, 10 Vr. 122, 128 (Ct. Er. & Ap.)

(d) The Resolutions are Unreasonable, Oppressive and Fraudulent.

The railway company owns north, south and east, of the proposed bridge. Its embankment will completely bar the canal on each side of the bridge and will close the east end of the bridge. The only possible purpose is to embarrass the Company and assist Mr. Packard to extort more money.

The power to grade streets or construct bridges is a general power of which this is a particular exercise; the power to permit an individual to grade and to build a drawbridge if it exists at all, is an implied power, for the charter gives no such power expressly; such power must be reasonably and honestly exercised. The validity of municipal action may be assailed collaterally for unreasonableness, oppression or fraud.

Dime Savgs. Inst. v. Hoboken, 13 Vr. 283, 296.
Dillon Mun. Corp. § 321, § 316, § 312.
Hutchinson v. Board of Health, 12 Stew. 569, 572, (Ct. Er. & Ap.)
High on Injunction, § 1243.
Dayton v. Quigley, 2 Stew. 77.
P. R. R. v. J. City, 18 Vr. 286.
Red Star Co. v. J. City, 16 Vr. 246.

4. THE WRIT OF ERROR DOES NOT IMPAIR THE TITLE OR RIGHT OF POSSESSION OF THE COMPANY.

The Commissioners' Report fixes the time of vesting of title; and payment of the amount found by the jury perfects the right of possession. The validity of condemnation proceedings cannot be tested collaterally, but only by certiorari.

Tucker v. Freeholders, Saxton 282, 287.
Lewis Em. Dom. § 601.
State, Morris & Essex R. R. v. Hudson Tunnel R. R., 9 Vr. 548, 550, 552. (Ct. Er. & Ap.)

The appeal is given on the question of damages only.

Van Wickle v. R. R. Co., 2 Gr. 162, 165.

The writ of error brings up only the questions before the Circuit Court to which it is addressed. The Judge of that Court cannot certify a record which is not before him, nor can there be a reversal except for errors on the issues in that Court.

The right of possession was not before that Court. It depends upon some proceedings which precede and on others which follow the trial of the appeal. The report of the Commissioners filed is the title deed. The contest on appeal is a suit for the price of land after the deed has been delivered; in such a suit would anyone contend that the Court could pass on the right of possession? Payment of the amount found by the jury into Court is made a tender. Rev. Supp. p. 128. It is not even requisite that judgment be entered up. The possession is not made to depend on that, but only on the payment or tender of the amount awarded by the jury. On this payment the company may enter and take possession of the lands and proceed with construction. (Rev. p. 929, § 101, last proviso).

The question of possession is therefore out of the cognizance of the Supreme Court by writ of error, A reversal of the judgment would not restore title or possession. The remedy would be that given by the statute, of a lien upon the land and a right to sue. and possibly execution on the judgment.

The writ of error is sometimes called a supersedeas, but it is not such in the sense of a certiorari. It is simply, on certain terms, by statute, *a stay of execution;* it is not a stay of anything else. 9 Bac. Abr. 286; 12 Mod. 567; 1 Lev. 153; 2 Roll. Abr. 491, D. p. 3. It will not bar action or any other proceedings on the judgment, Nat. Bank of Dover v. Dodge, 13 Vr. 316, 322; Suydam v. Hoyt, 1 Dutch, 230.

Except by statute a writ of error is not even a stay of execution unless by special order of the Court in which judgment was entered.

Allen v. Hopper, 4 Zab. 514.
Ferris v. Douglass, 20 Wend. 626, 628, 629

And a writ of error is no stay of execution if allowed after levy. 1 Arch. Pr. Bac. 220; Meriton v. Stevens, Willes, 271; Smith v. Kinsley, 19 Wend. 620, 623; Boyle v. Zacharie, 6 Pet. 648, 659.

Not only is the writ of error not a stay of our right to possession, but it is not in the power or jurisdiction of either the Circuit Court or Supreme Court to stay us in that suit. Every Court has control over its own executions, but the right to possession is not awarded us by the Court; it is conferred by a statute which has given the Commissioners Report the effect of a conveyance.

The effect contended for would turn the writ of error into an execution in ejectment. It would leave a R. R. Co. liable to be dispossessed at the will of the owner at any time within three years from the trial of the appeal.

5. The Canal Cannot be Protected as a Public Improvement.

How can the Court hold that this private canal scheme is a great public improvement? The general canal law will not permit canals in cities; they are not only obstructions to travel but noxious to health, especially where at the level of tide-water and closed at one end, like the notoriously offensive canals in Brooklyn. As to the claim that Bayonne needs more harbor front, a glance at the map of the city is a sufficient reply.

Mr. Packard is in no situation to urge that the company is causing him unreasonable injury. There was no canal on his land when the condemnation began; up to that time his work had been restricted to the lands under water and the railway company could not make provisions for the canal when they did not even know that it was designed. In fact Mr. Packard did not own all the land necessary for it, and for years had been working in the Bay (Case 44, l. 30 to 40). No amount of bold assertion can convince any rational man that he worked for years and spent $115,000, on a plan involving the purchase of lands he did not own. The work in the marsh was an afterthought, and we think it is fair to say that Mr. Packard did not design it until he saw its usefulness as a device to swell damages. It is preposterous to say that the canal in the marsh is at all essential to the improvement or use of the channel in the Bay. Apart from Mr. Packard's invasion of the streets belonging to the city, he has urged the injury to his scheme for more than it was worth on his appeal to a jury from the Commissioner's award. With what show of equity can he delay his attack on the reasonableness of the crossing until after he has experimented with a trial by Commissioner's and a jury?

The order appealed from should be affirmed.

DICKINSON & THOMPSON,
Sols. and Coun. of Respondent.
COLLINS & CORBIN,
Of Counsel.

In New Jersey Court of Errors and Appeals.

Between— RALPH G. PACKARD, Appellant, and THE BERGEN NECK RAILWAY COMPANY, Respondent.	On Appeal from Injunction Order.

BRIEF FOR APPELLANT.

If this order is sustained, it results in recklessly and unnecessarily destroying a large part of Mr. Packard's enterprise, upon which he has expended about $150,000. For the particulars of it read in the answer from page 43, commencing at folio 40, to page 45 down to folio 14; also page 63 from folio 25, to page 64 folio 18; also page 61 to folio 20; see also the map in connection with the answer. The particulars of the case are fully and methodically set out in the answer, so that the same may be readily understood, and to which attention is invited without repetition.

The bill is filed by the railroad company to restrain the land owner from interfering with the company in the construction of its railroad upon land which is his, until the railroad company has a lawful right to take it. The granting of the injunction restrains the land owner from doing any act to protect his possession, and enables the railroad company

to proceed to fill up the canal or basin, and render it entirely useless west of the railroad line. It is claimed by the complainant that the land has been condemned and in legal effect paid for. We will first consider that question.

1.

The award of the Commissioners was made March 13, 1890. Mr. Packard at once appealed. The appeal was tried April 30,—May 2, 1890, in the Hudson Circuit, before Mr. Justice Dixon and a struck jury, the jury rendering a verdict of seventeen thousand dollars, value of the land and damages. No judgment was entered thereon by Packard, for the verdict was unsatisfactory to him. The railroad company, however, on the sixth of September, 1890, entered up the judgment. The particulars are in paragraph 3 of the Answer, pages 46—49. Read the same in this connection. Negotiations were, in fact, pending between the railroad company and the appellant for a settlement of all matters in difference when the judgment was entered by the company.

On the 27th day of September, 1890, the President of the Railway Company and the defendant were in conference with a view to a settlement, up to one o'clock of the afternoon of that day. The particulars of such negotiations are found on pages 48, 49 and 50. The parts of the answer referred to in this connection, should be distinctly understood in order to see the grossness of the conduct of the company in lulling Mr. Packard to rest under the color of negotiations, and then taking measures to pay the amount of the verdict into the Court of Chancery by obtaining the order of September 26, 1890. On that day, a bill was filed, which is marked Exhibit C. No. 5, page 45, and

which is sworn to on that day. The order to pay the money into court bears date September 26, 1890, and is found on pages 14 and 15. The money was actually paid into Court September 27, 1890; see affidavit of Charles D. Thompson, page 17; and notice given to Packard September 29, 1890 of such payment, page 16. As soon as this notice was served, the writ of error upon the judgment was actually issued, the same having been prepared September 9, 1890, awaiting the result of the negotiation; page 52. The effect of this writ of error, and the equities surrounding it, will be hereafter separately considered. We are now upon the question of the payment of the money. By referring to the order, page 14, it will be seen that the money was paid into court under "An Act respecting awards of Commissioners in cases of lands and real estate taken and condemned by law, and appeals therefrom," approved March 2, A. D. 1877. The bill to pay the money is founded upon the same Statute; page 29. The statute is in the Revision page 1278, and in the Supplement, page 128. The payment of the money was not made under Sec. 13 of the General Railroad Act, Revision 922. That Section provides as follows: "But in case the party or parties entitled to receive the amount assessed by the Commissioners in case there shall be no appeal, and in case of appeal the amount found by the jury, shall refuse upon tender thereof being made to receive the same, or shall be out of the State or under any legal disability, then the payment of the amount assessed or found as aforesaid into the Circuit Court of the county wherein the said lands lie shall be deemed a valid and legal payment." According to that provision the payment is to be made into the Circuit Court. But this payment was under the act of March 2, 1877. The General Railroad Law, in Sec. 13, provides "That in no case whatever shall said company incorporated under this act enter upon or take possession of any

land of any person or persons, for the purpose of actually constructing said railroad, or of making any erection or improvement whatever, or otherwise appropriating said lands to the use of any company incorporated under this act, until they have paid to the party or parties entitled to receive the same, the amount assessed, &c." This language is very clear. This railroad company was incorporated under the general railroad law. Primarily, payment must be made to the landowner. In case of refusal to receive the money, or if out of the State, or under a legal disability, then there may be what may be called a "substituted payment" into the Circuit Court where the lands lie. The bill under which he money was paid alleges the existence of mortgages upon the property; also that Packard had conveyed a portion of the land sought to be condemned to the Bayonne City Terminal Railway Company, and that there were liens for taxes in arrear upon the premises due to the City of Bayonne, and for that reason the effort is made to bring the payment within the act of 1877. If neither the general railroad act, nor the act of 1887 is sufficient to justify a payment either into the Circuit Court or the Court of Chancery, then certainly the payment into the Court of Chancery could not be complete so as to divest the title until after a decree of the Court of Chancery to that effect. We do not deny that a party may invoke the equitable jurisdiction of the Court for the purpose of having the money appropriated to where it belongs, but that is a very different thing from making a payment under either of these statutes, where by the mere deposit of the money into court it operates as payment, and compels the land owner to give up his title, and look to the money alone as deposited for the value of his land and damages, or to the mere credit of the railroad corporation if the judgment on the appeal is set aside, and a larger amount recovered upon a new trial. It is probable that the complainant had some misgiving as to the application of

Sec. 13 to the facts of this case, but it is a good deal easier to give the words *legal disability* a liberally construction, and bring the case within Sec. 13, than to pervert the object of the Act of 1877 so as to cover this case. If the legislature is imperfect in either one of these respects there is no reason why the Court should not let the land owner rest upon his title as against the railroad company until the Legislature provides a remedy, or the Court of Chancery shall decree otherwise. The first section of the Act of 1877 gives the application of the Act. Most of the early charters provided for an appeal to the Court of Common Pleas of the County where the land lies, and the Circuit Court is substituted by the Act of 1877 in the place of the Common Pleas. Those charters also provided for the payment of the amount of the award into the Court of Chancery subject to the order of the court, for the use of land owner, but generally made no provision for payment on appeal. A reference is only necessary to two of them, one, the New Jersey Railroad and Transportation Company, Laws 1832, page 98, Sec. 6; and the Camden and Amboy Railroad Company, Laws 1830, page 83, Sec. 13, 14. The question was raised in 18 Vroom 60, United Companies vs. Welden, whether this act of 1877 could repeal the provisions in the Charter of the New Jersey Railroad and Transportation Company as to the Court in which the appeal was to be taken. That case shows to what legislation the act of 1877 had application. Now then look at Section 2—" That whenever it shall appear to the Chancellor that the lands taken pursuant to *any law or act aforesaid* are encumbered by any mortgage, judgment or other lien of any kind, the money *awarded* to the owner or owners of said lands may, by the order of the Chancellor, be paid into the Court of Chancery, and shall there be distributed according to law, and written notice given to such owner or owners that such money has been so paid into Court shall have the same effect as if the money

so *awarded* had been actually tendered to the owner or owners aforesaid." Remembering now that the charters which provide appeals to the Common Pleas, provide also for the payment of the amount of the award of the Commissioners into the Court of Chancery, making no provision generally as to the appeal, what does this section 2 mean? The natural meaning of it, is that in those acts which provide for appeals to the Common Pleas, and under which the amount of the award of the Commissioners could be paid into the Court of Chancery, in the case of mortgage, judgment or lien, the same power could be exercised. But what is it? The second section does not provide for the payment into the Court of Chancery of the amount *found by the jury*, as mentioned in Sec. 3 of the General Railroad law. The old idea was that an appeal was a mere gratuity of the law, and that land could be condemned without it. But our general law secures an appeal, and also secures to the land owner, the payment of the amount which shall be found by the jury, before the railroad company shall enter upon or take possession of the land condemned. Giving then, section 2 its full force the payment "shall have the same effect as if the money so *awarded* had been actually tendered to the owner or owners aforesaid." The general railroad law in regard to appeal and the protection of the owner against any invasion of his property until compensation be made, secures to him a greater protection than under those old charters. It was so intended. And the act of 1887 was not intended as a law to apply alike to all railroad corporations, whether organized under Special Charters, and acting thereunder, or under the general railroad law. The general railroad law is a complete scheme in itself, its design being literally for the protection of the landowner in this respect, and to give him every advantage that the courts may furnish, in order that his damages may not only be ascertained by Commissioners, unlearned in the law, but by the action

of a jury, under the direction and review of learned tribunals. The word "awarded" in Sec. 2 of the Act of 1877, is significant, because, in the early charters it has referance to the report of the Commissioners; the amount reported by the Commissioners is mentioned as the amount awarded. How can the concluding clause of Sec. 2 be twisted into an application to the appeal which has been secured to the landowner under the general railroad law? We also submit in this connection that the first clause of Sec. 2 "That whenever it shall appear to the Chancellor that the lands taken pursuant to any law or act aforesaid are encumbered &c," is jurisdictional, and must be so decided by the Chancellor, and not in an *ex parte* way. The deposit of the money into court, may amount to payment under the old charters of an award of the Commissioners, and allow the company thereunder to take possession, but not until an adjudication upon a hearing on notice, so that the party may have an opportunity of being heard whether he shall be subjected to the expense of a suit in Chancery before he gets his money, or any part of it. This provision in Sec. 2 merely regulates the inherent power of the court, which court can act only judicially and in proper methods so as to secure the hearing. Platt vs. Bright, 4 Stew. 879. The point right here is not as to whether under the general jurisdiction of the Court of Chancery the money may be paid into court and distributed by judicial proceeding, but whether on being deposited it amounts to payment for land and damages, so as to divest the owner's title. A statute ought to be very clear to justify that, for the Constitution secures the payment of just compensation before private property may be taken. But we go farther and insist that if any liberal construction is to be given to a Statute to help out imperfect legislation, that the words *legal disability* under the general railroad act, can be much better expanded so as to include the case before us than the Act of 1877. We contend, however, that the mere inability to find

either statute clear, is no justification to expand the language as against the landowner. If we are right under this head the title still remains in the landowner, and there can, therefore, be no ground whatever for the injunction.

If this is a doubtful question, then under the established ruling of this court, the complainant would not be entitled, we submit, to a preliminary injunction, but Packard would, we think, in order to protect his title until his rights are settled,

The railroad company was originally organized in 1885. Scarcely any work has been done upon it. The pleadings show this. And the affidavits show that, now the objective point of attack is at this canal or basin, and in order to shut it up. Why should not Mr. Packard's rights be deliberately heard and determined, and not concluded in this way?

We have ventured to argue this point fully, notwithstanding the pronounced opinion of the Vice-Chancellor that he regards it as absurd; page 104; and also to say that there are some things in his opinion which it is difficult to account for except in the haste of its preparation long after his views were orally pronounced immediately at the close of the argument of the case. He surely could not have meant to say, on page 104, that we intended to admit that this was a proper case for payment under the Second Section of the Act of March 9, 1877. Neither did we intend to admit anything that did not appear in the case. The case here is to be heard on the pleadings and the evidence, and upon nothing else, and this remark is applicable also to page 109, wherein, in a very loose way the Vice Chancellor speaks of an unwillingness on our part to submit to terms which were not defined, and had the color of an attempt to bargain. If the Chancellor thought there were any equities in the case which justified the imposition of terms, he should have said so, and left us to deliberately consider what our duty to Mr. Packard required of us.

2.

The next point for consideration is the effect of the writ of error, and from two points: one, as to the effect of it *per se;* the other, what the equities require in view of the fact that the case at law was under review?

We have already referred to the fact of the negotiations in the answer. By referring to the afficavit of Mr. Thompson, on page 17, the negotiations came to an end without result September 27, 1890. Pending those, the bill to pay the money was filed in the Court of Chancery. The answer in this respect is distinctly sworn to by Mr. Packard, on page 69. The affidavit of Mr. Fuller is also found on pages 69 and 70. There is a further affidavit of Mr. Fuller on pages 84-5; and also of Mr. Packard on pages 86-7. A further affidavit is made by Mr. Sterling in reply to the defendant's affidavit, and is found on page 39, bearing date October 13, 1890. According to that affidavit the negotiations were declared to have failed by both parties on Friday, September 28. An engagement for Friday, the 26th, day of September, 1890, was pending which Mr. Packard was unable to keep, and notified Mr. Sterling to that effect, and the next day, Saturday September 27, was fixed for the appointment, which appointment was kept by the parties on both sides. We submit as a fact, that Mr. Packard was relying upon the status of the litigation being preserved pending these negotiations, and the Vice Chancellor held, on page 103, that the defendant was entitled to stand before the court precisely as he would have done, if he had sued out his writ of error *instanter* the judgment was entered on the verdict. But he also held that the writ of error did not affect the complainant's right to take possession under the verdict found by the jury.

The appeal is a right secured to Packard under

the statute. When taken, the ordinary judical functions of the court are sought and depended upon. Hence it has become settled that the verdict and the judgment of the Circuit Court may be reviewed the same as in any other case. It is unnecessary to amplify on these leading principles. At one time there was a mere scramble between the payment of money into the Circuit Court under the general railroad act, and the perfecting of an appeal, to see which party could get ahead. That seemed so disgraceful to the administration of the law, that this court held that the landowner must have a reasonable time to appeal. That principle is perfectly equitable, and is founded upon a due regard to the security of the rights of the land-owner. We contend here that there is no force simply in the verdict, apart from the judgment of the Court, and that the railroad act must be construed so as to guarantee to the land-owner the right of review if he desires it before the verdict has final effect.

Any other construction would make the protection of the land owner imperfect, and in case the verdict is set aside and a greater amount recovered, leave him to the personal responsibility of the railroad company only, for the value of the land and damages, which in many cases might be very much higher.

What then, in the first place, is the effect of the writ of error in itself? The statute as to a stay by recognizance, Revision pages 374-5, has no application whatever, for the reason that the appellant is removing a judgment, apparently in his favor, although not in fact so in this case. The judgment is unique, and the writ of error must rest upon its common law effect, the statute making no provision for such a case. The appellant is not seeking to stay any execution, but only to have the judgment reviewed. There is no power in the statute to compel the railroad company to give security, and it is inappropriate for him to give a recognizance to satisfy the judgment. Such a pro-

ceeding, to use the language of the Vice Chancellor would undoubtedly be absurd. Bail in error is a creature of the statute chiefly. No bail in error was required at common law. Tidd's Practice 1074, marginal page. B ut inasmuch as a writ of error might be used to stay execution, when the errors were frivolous, a practice grew up to some extent by which the writ of error would be refused, or its effect controlled, so as to prevent wrong to a party from the mere fact of the writ. In other words, the operation of it would be controlled by the court so as to permit the collection of the judgment. Whether that practice had its foundation simply in the exercise of this power by the court, or in the statute of Henry VII, is not entirely clear. At any rate the matter was then controlled by statute, which, as we understand, is the foundation of our acts in regard to a writ of error acting as a supersedeas. A practice has also grown up in this state, not stay, as a matter of course, a suit upon a judgment where a writ of error has been obtained; but the courts are liberal in restraining the collection of the money until the writ of error has been determined, either upon giving security, or upon such other equitable terms as would be proper under the circumstances, the tendeney of the court always being to give a party a full opportunity for review without being obliged to actually pay the money and then trust to judicial proceeding to recover it back. As stated this judgment is peculiar, and if a party chooses to take a writ of error upon it, why should he not be allowed to prosecute it? The case, we submit, is not within any defined common law practice of the court controlling the writ of error, but within the effective power of the writ at the common law, that the writ of error does stay. If we are right in this, then the complainant has no right to the injunction pending the review of the case.

If we are wrong in this, then, we contend, that a court of equity should do no act to deprive us of the

right of review. What equity is there for the railroad company to stay the hands of the landowner in asserting his possession? The equities on this question pressed the Vice Chancellor very closely, but he disregarded them, tied the hands of the landowner and allowed the complainant to put him at defiance.

In 1885 the complainant made some show of work on its railroad for about 100 feet, by laying tracts on the meadow between 29th and 30th Streets on the east side of Avenue F and about 500 feet from the canal or waterway of the defendant. That work was not upon any of the defendant's ground, and has remained in that condition from that time to the present. This is the only work that has been done by the complainant towards the actual construction of its railroad, except what was done on the 29th and 30th days of September, 1890, on the property of the defendant, intended to fill up and destroy the canal or water-way; see page 42 of the answer. That work was done after the complainant had obtained his order to show cause and a stay upon the defendant thereunder. The order was afterwards modified so as to preserve the existing status. Neither had any authority been obtained from the Common Council of the City of Bayonne to cross East 28th Street at grade, and when the bill was filed the raiload company was in no condition to construct its road at *grade*, as required by the general railroad law; see page 66. That question will be further considered hereafter.

The situation of things equitably then is this: The verdict was obtained May 2, 1890; soon after. negotiations were entered upon between the parties with a view of settling the matters in dispute and substituting another route for this. Mr. Packard entered up no judgment upon his verdict; he was dissatisfied. By common consent and arrangement, the litigation rested to see if an agreement could not be reached. Mr. Packard relied upon the good faith of these negotiations. The answer is full in

this respect, and the affidavits of the complainant show their existence and that the parties were treating up to the afternoon of September 27, 1890. On September 6 the railroad company, in order to preserve its rights as stated by counsel entered up judgment on the verdict, that being the close of the pending term. Instead of continuing the matter until the next term the railroad company took that course. Even then, it was not intended that that should interfere with the continuance of the negotiations, but having obtained the judgment, the complainant must have commenced soon after to prepare that bill for the Court of Chancery for the payment of the money into court, for it was sworn to on September 26, 1890 by the attorney of the company; see page 31; and the order to pay was obtained the same day; page 15. The money was paid September 27, 1890, the very day the negotiations were pending, and they were not declared off until the afternoon of that day. While the parties were actually in negotiations, it looks as if the money was being paid into court at Trenton, or earlier than the negotiations of that day. The negotiations were in the City of New York, the money was paid, as we assume from the record, at Trenton. No notice was given of this until the 29th. As soon as given to Mr. Packard, he sees his counsel, and the writ of error is at once issued, it having been prepared September 9th, to await the result of the negotiations. Now, under these circumstances why, we ask, shall not Mr. Packard have the benefit of his writ of error? Whatever the technical rule of law may be as to the effect of the writ, we insist that the equities are so strong that in spite of them the complainant should not have his injunction. A denial would give us some show to protect our position. But we go father than that, and claim that, under the circumstances of this case, the railroad company should be restrained from interferring with us; and this we pray in the cross-bill.

The company is in no condition to proceed with its work now. Several streets opened by authority of the Common Council of the City of Bayonne will have to be crossed or occupied in part at grade, among them East 28th Street. The assessment taken by the company was on the basis of six feet above high water on an embankment or trestlework; page 64; which is substantially the grade of East 28th street as established by the city authorities; page 66. The affidavit of Emmet Smith, the city surveyor, is substantially the same; page 70. With reference to Sec. 14 of the general railroad law, Revision 930, which requires that a railroad shall cross a street in a city either above or below the grade thereof at such distance as shall not interfere with the free and uninterrupted use of the street, unless the Common Council shall grant permission to cross at grade if they shall deem it to be to the best interest of said city, that section was revised by the act of April 28th, 1887, laws 1887 page 226, but in this respect there is no change. The Vice Chancellor thinks that advantage of that provision can be taken only by the city. This we dispute, because, as a landowner Mr. Packard has a right to the benefit of it. His land adjoins the street and the right of way of the railroad, and there is no equity for the railroad company to decline to go before the jury and have damages estimated with reference to an embankment for an overhead crossing, ask for an assessment on an embankment at grade, and defy the city authorities, whose duty it is to protect Mr. Packard, as a landowner, from a grade crossing. It will hardly do to say, that the company would not be obliged to regulate itself by the laws that exist, in the absence of permission from the Common Council to cross at grade, while Mr. Packard, the landowner, is to be subjected to a charge, as appears in the case at the Circuit, that the fact of certain streets having been opened crossing the basin, by ordinance only, is sufficient to

prevent the jury from considering that the city might authorize changes therein, adapted to the existence of the basin, and that Mr. Packard must be prevented entirely from recovering damages in view of the probability of the city doing whatis right, and what the commercial and business interests of that locality might require. Explain this in view of the charge. We may well say that in regard to these streets the company should be in no such hurry to force us to the wall, as would impair our right to a review and the benefit thereof if the verdict is set aside.

3.

A railroad company under the general railroad act takes only an easement in the land, and any right that the landowner may exercise consistent with that, he is entitled to. The foundation of the right of eminent domain is necessity. Cooley in his Constitutional Limitations *557, says: "The right being based on necessity cannot be any broader than the necessity which supports it;" and "In respect to the land actually taken if there can be any conjoint occupation of the owner and the public the former should not be altogether excluded, but should be allowed to occupy for his private purposes to any extent not inconsistent with public use. As a general rule, the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner." We refer also to Revision 928, paragraph 12, to show that the title in fee is not taken, but only the use and enjoyment, or in other words, an easement. See also

9 Vroom 28, Taylor vs. New York and Long Branch R. R. Co.

18 Vroom 518 Hibernia R. R. Co. vs. DeKamp.
S. C. Ibid 41.
17 Stew. 329, Zinc Company vs. Morris Canal.
Lewis on Eminent Domain, § 278.

Packard is the owner in fee subject to an easement. He can be deprived of his property only so far as necessary for the enjoyment of the easement. There are many instances in which this question may come up. Take the crossing of the Tale Race of a mill, or a stream to supply the pond, or a marl pit, or a clay bank, or a quarry, or a mine of any kind. Whatever rights of property consistent with the easement can be preserved to the landowner, we submit are not within the power of eminent domain. The existence of the canal was also *apparent.*

The railroad company seeks to destroy a great enterprise. Is it necessary to do so? The company says it is; the landowner denies it. In what then is his protection? Under our general railroad law which allows the location of a railroad almost anywhere at the will of whoever may choose to organize a company, there should be a judicial control over this question of necessity. It is important even to railroad companies as well as landowners, in order to protect vast terminal properties from being exposed in condemnation proceedings to unnecessary invasion. This principle of necessity lies at the basis of condemnation. It may be abused. Certainly it should not be within the absolute control of the condemning company. On the trial at the Circuit, the company was allowed to declare how it would cross the canal or basin: that it would shut up the same and take an assessment accordingly. Mr. Packard was not permitted to have the jury consider the question of damage in view of a crossing with a drawbridge at the canal or waterway. The ruling was based on

the idea that the complainant could elect the mode of crossing, and entirely obstruct the use of the canal or waterway if he chose. The company took, under that ruling, the assessment at its peril, and if there are equities underlying it we submit that protection should be given here. See the ruling of the court and the effect of the verdict, on pages 64-66; also the charge printed on page 20 &c. We think the jury should have been allowed, upon the appeal, to pass upon the necessity of constructing the railroad without a bridge and thereby destroying the basin, and that we ought to be heard upon that question, as well as other questions involved in the writ of error, and that the Court of Chancery should take no action that would prevent it. The only justification in preventing it, would be in having the Court of Chancery take control over it, so that the rights of the landowner should be preserved to him against anything but necessity. And while we do not ask an unreasonable consideration of the term "necessity," we do insist under these pleadings and the evidence, that the railroad company can cross the waterway upon a bridge so as to preserve to Packard the substantial use of it, and whether this court can so decide or not at this stage of the case, that our right to a full and fair investigation and decision of the question should be preserved here, and that no injunction should issue against us to settle the question *in limine.* We invite careful attention to the scope and character of the enterprise as set out in the answer.

Equity will protect a landowner against the invasion of his land by a railroad company until a right has become vested in the title, to take it. The measure of the right, we submit, is also a proper matter for equitable concern. Whether the whole title is to be taken, or a part, it is all subject to the question of necessity. And why should not equity interfere to protect a part as well as the whole to the landowner? If there can be a mutuality of use

so that the necessities of the railroad company and the rights of the landowner in the preservation of his enterprise, can exist in harmony, that is a question of equitable control. It is pretty hard law that because a railroad company says, we need the whole of a man's land, and take an assessment accordingly, that there is no relief in equity upon the question whether, fairly and justly, it comes within the principle of necessity. There should be a review of that question, and what better tribunal than equity to determine it? At any rate the jurisdiction, we submit, is equitable, if not exslusive, for the state of the law on this subject is as yet pretty open. If jurisdiction exists at law, then the opportunity should be given, in the trial of the very case on appeal, to have the jury pass upon it. On this branch of the case we ought not to be concluded (for that's the effect of it), by a preliminary injunction, and the canal shut up.

If equities exist in favor of Mr. Packard the fact of the verdict will not stand in the way of relief to him, for the court will control the operation of legal proceedings, verdicts and judgments to protect and enforce equities.

Pomeroy Eq. paragraph 1360–1365.
Henwood vs. Jarvis, 12 C. E. Green 247.

Verdicts and judgments do not stand in the way of equitable action; they are often restrained or subordinated to the equities of the case.

There is nothing in the fact of the condemnation of *land* in terms, which excludes equitable control. The railroad can take only an easement under that word, and the scope of the easement is the question involved. Now, while it is true that the complainant was permitted before the jury to state how the road was to be constructed across the basin, and to take an sssessment thereon, yet that assessment is available or not to the complainant, as the same may stand the test of the company's equitable right to use it in

the mode proposed. The company comes into equity and asks an injunction. If there is any question about the equity claimed, the injunction should not be granted. The case presents here important questions for consideration, and upon which all the testimony should be produced and finally determined with deliberation. Opportunity should be given to produce expert and practical evidence; for the questions are of such a character as to need the best skill. And here we remark that the court below failed to take in the full force of the answer. It appears therein that Mr. Packard is a civil engineer of long experience and skilled in just such work as this in question, and he swears distinctly to the answer. We were not obliged in answering this claim of the defendant to treat the case as upon final hearing. We deny the equities of the bill under oath, and why should we not have a fair hearing and not be put at defiance now, at the very start of this suit. If we are not entitled to an injunction on the strength of the crosa-bill, certainly, we submit, the complainant should be denied his prayer to enjoin us, so that the landowner be allowed at least the opportunity of protecting his possession. Again the practice of allowing the railroad company, either before the Commissioners or on the appeal, in a condemnation under the general clauses of a statute, to show how the road is to be constructed and to take an award or finding thereon, shows that there is nothing conclusive in such a record as this as to the establishment of the mode of construction, or in this case, the crossing. It is settled in this state that if under such a general condemnation an assessment has been taken according to a certain *orally* alleged plan of construction, that in case of a departure therefrom the landowner will be protected. The principle is that his equities will be regarded, notwithstanding the condemnation is general, *as land*.

9 C. E. Green 250, Carpenter vs. Easton & Amboy R. R. Co.
S. C. 11 C. E. Green 169.

Now, what is there to conclude a landowner if, as in the case before us, the railroad company has been permitted to announce its mode of crossing, from setting up in a court of equity, particularly when relief is sought by the railroad company that it is not equitable to cross in the way proposed.

On th subject of the practice in taking these assessments we also refer to Lewis on Eminent Domain, § 481.

We are asking a hearing on these questions raised by the answer, with an opportunity to take the testimony and to have the final judgment of the court, and not to have the railroad company, by a mere act of force, take our possession with the assistance of the Court of Chancery.

We make the point distinctly that the condemnation proceedings on their face in no sense conclude us in equity. And further, if there is any difficulty on that question, then that our possession should be protected until the case at law can be reviewed on the writ of error.

In view simply of giving an opportunity to be heard upon the merits, and if it were a mere matter of discretion alone, the status of the parties previous to the order for an injunction should be preserved to await the decision of the Court of Chancery upon final hearing. But the complainant says, no—this great enterprise must be destroyed in advance and the litigation take place afterwards. This view is in accord with the opinion of the Vice Chancellor.

The leading statements of the answer, are not controverted by the complainant, and we do ask most earnestly that we have a full opportunity to be heard before this great project is destroyed or materially impaired.

The assessment obtained by the complainant can only be used by him or not, as the equities of the case will warrant. There is nothing which estops the landowner in this respect we insist.

4.

There is another point which the complainant has not thought worth while to meet. The railroad company was organized July 20, 1885; the charter would expire at the end of two years from that time by reason of a want of completion of the road, unless the time for completion was extended by a compliance with certain acts of the Legislature. There is a mere general averment in the bill that the time has been extended. This is disputed in the answer. See

Bill, Par. 1,
Answer, Par. 1, page 42-3.

There is no proof by the complainant upon this subject. Should the complainant have an injunction under such circumstances? We contend that in a court of equity the fact of the condemnation proceedings, does not estop us from setting this up.

5.

There are a few matters to which we make reference together, under this head:

In regard to the authority derived from the City of Bayonne to build a bridge and to grade East 28th St. on the land of Packard, and the vacation of certain other streets across the basin, which had been opened technically by ordinance by the City of Bayonne several years ago, we remark that, notwithstanding the criticism of the Vice Chancellor, we are dealing with *property* questions, and Mr. Packard cannot be com-

plained of if he seeks, by all lawful means as he fairly supposes, to protect his property against such a wanton injury as he thinks the company intends. On pages 10–12 is his petition to the Common Council, which was granted. Its legal effect is one thing; the right to attack Mr. Packard or his counsel, Mr. Fuller, is another thing. How does the Vice Chancellor know that Mr. Fuller as counsel of the City of Bayonne, was engaged, in improperly using his office for the benefit of Mr. Packard? But it is not worth while to delay on that matter. It is not very agreeable, and at best not very appropriate to the decision of the case below.

The court treats the proceeding as to the bridge and the grading as void, because they should have been by ordinance. This we dispute, and say that under the charter we cannot see why the authorization of the construction of the bridge could not be made by resolution. See the Charter of the City of Bayonne, March 22, 1872, Sec. 84. But it is sufficient to say that the resolution cannot be attacked collaterally, and] should be reviewed only upon certiorari.

As to the vacation of the streets; that arose out of the stringent character of the charge of the court below weich limited the scope of the enterprise by the streets as ordained, without reference to the question whether any alterations would naturally be made by the city in the streets so as to preserve the canal or basin. Under the charge the jury could not look into the probability or possibility of the city doing what, in the progress of such an enterprise, would naturally be done. Land is often so located that its adaptability to development is clear and in due course will be brought into market. That is an element of value, although the means of improvement may not as yet have been secured or defined. So a tract may be shut in, yet in the progress of growth and demands of the locality it may be sure to be opened for its natural and proper de-

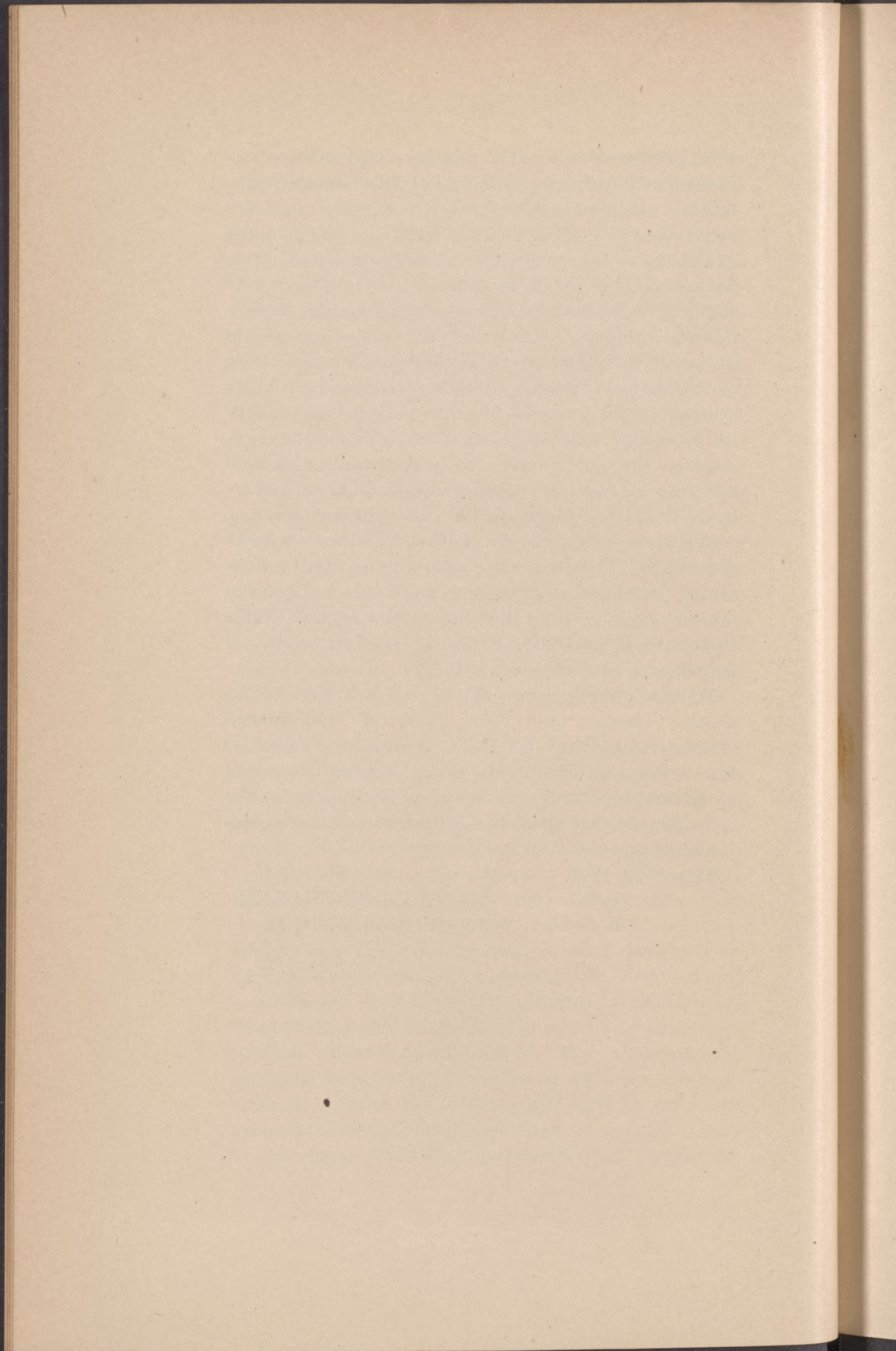
velopment and uses. The relative adaptability of improvements and things can be judged of according to what is likely and natural. The court laid it down as a rule of law that probable matters with reference to these streets could not be considered by the jury. That is the point of the charge in this respect. If the enterprise were reasonable, and one which were demanded by the commercial and business interests of the City of Bayonne, the jury could regard the probability, we submit, of such reasonable action on the part of the public authorities, whether by the city or even the Legislature, as would foster or encourage the enterprise. There are many elements effecting values, of a prospective and natural character, which help make up market values.

With that charge, Mr. Packard naturally sought some relief from the city, and the fact that he obtained it, shows that the charge in this respect was (and we most respectfully state it) too severe. Under the circumstances Mr. Packard certainly ought not be subjected to harsh criticism.

But we go further and say, that in view of the whole scope of this case, if it turned simply upon giving Mr. Packard an opportunity for his review on writ of error, that equitable discretion alone ought not only to deny an injunction for the complainant, but allow the defendant to have his injunction as prayed for.

March 12, 1891.

CHARLES W. FULLER.
JOSEPH D. BEDLE.



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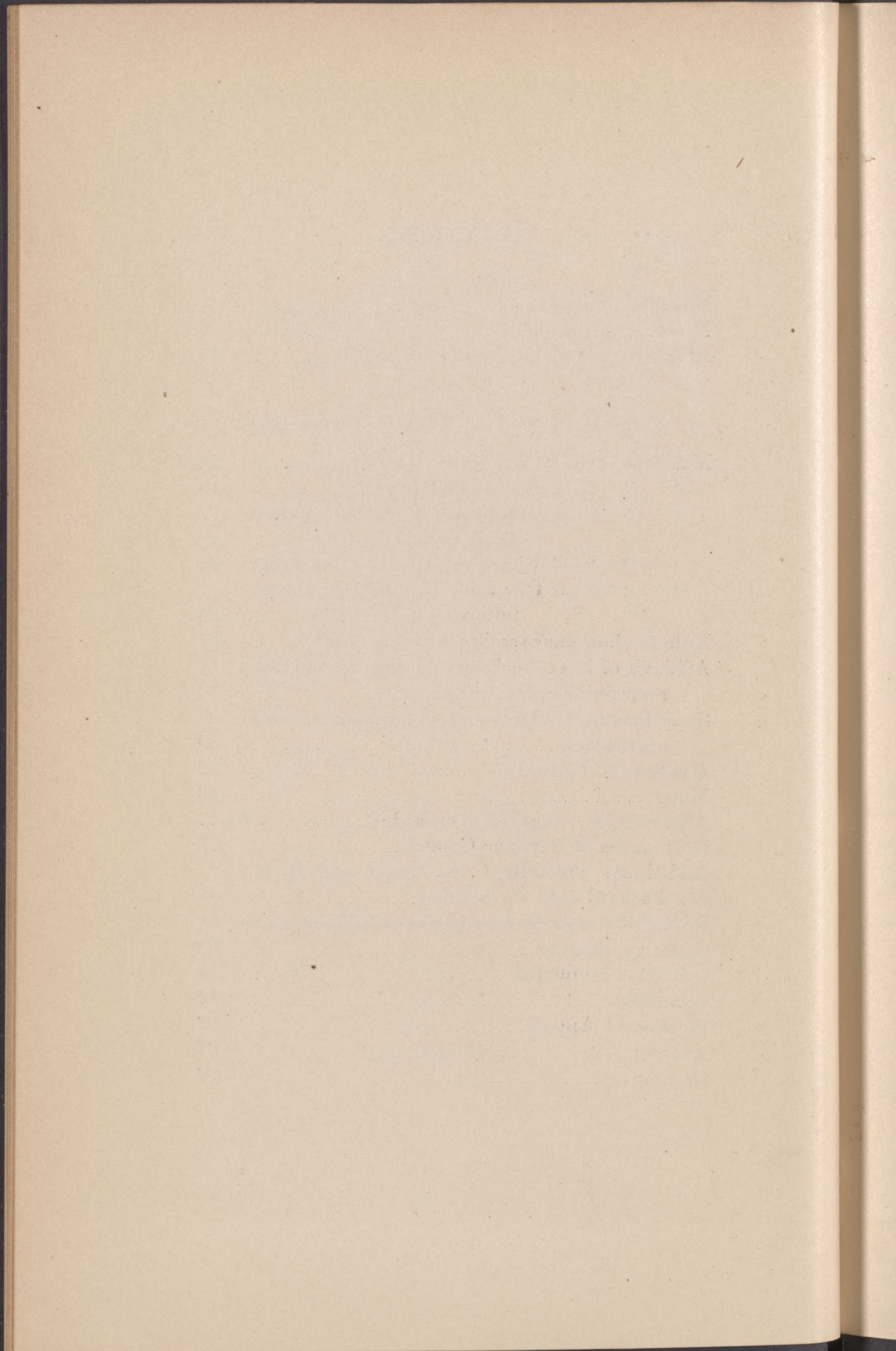


BILL OF COMPLAINT.

IN CHANCERY OF NEW JERSEY.

To His Honor, Alexander T. McGill, Chancellor.

Complaining showeth unto your Honor your orator, The Bergen Neck Railway Company, a corporation of New Jersey :

1. Your orator is a corporation organized under the general railroad law of the State of New Jersey by certificate filed on the twentieth day of July, A. D. 1885, and the survey of its location was filed the same day. The railroad proposed to be built by the company extends from a point in Jersey City along the easterly boundary of the route of the Central Railroad of New Jersey to the vicinity of Bayonne Station, where it curves to the east, following the general course of the shore of New York Bay to a point on Constable's Hook, on the Kill von Kull. The railroad has not yet been constructed, except for a short distance, but the time for construction has been extended from time to time by the Legislature, and the greater portion of the right-of-way has been purchased or acquired by condemnation proceedings and several hundred thousand dollars have been expended therein.

2. The route crosses the salt marsh lying on the south shore of New York Bay, in the City of Bayonne, a tract of which marsh bordering on the bay is owned by Ralph G. Packard, of which tract a parcel of one and eight hundred and ninety-four one-thousandths acres is included within your orator's right-of-way. In January, 1890, pending negotiations with Ralph G. Packard for the purchase by your orator

of the right-of-way, he began to excavate a canal or basin 150 feet wide in the marsh, from New York Bay southward across the right-of-way of said Bergen Neck Railway Company with the avowed purpose of establishing a large and deep basin for ships, on the general plan shown on the map annexed to this bill. Thereupon your orator commenced proceedings to condemn against him and
10 commissioners were regularly appointed by the Hon. M. M. Knapp, Justice of the Supreme Court, who made their report, which was dated March 13th, 1890, and filed on the same day in the office of the Clerk of Hudson County, fixing the value of the land of said Packard taken for the right-of-way and the damages to his land not taken, by virtue of which report and filing and the payment hereinafter set forth, your orator has acquired full title and possession for the purpose of constructing its railroad, as
20 by a certified copy of said proceedings and award offered herewith as an exhibit will more fully appear.

3. An appeal was taken by Ralph G. Packard from the award which was tried in the Hudson Circuit Court, and on the second day of May, A. D. 1890, a verdict was rendered fixing the value and damages at the sum of seventeen thousand dollars, for which judgment was entered on the sixth day of September,
30 A. D. 1890. On the twenty-sixth day of September, A. D. 1890, your orator applied to the Court of Chancery of New Jersey setting forth that the premises so taken were encumbered by liens, and pursuant to an order of the Chancellor made on such application, your orator paid to the Clerk in Chancery on the twenty-seventh day of September, A. D. 1890, the said sum of seventeen thousand dollars, and also interest thereon and taxed costs, and on the twenty-ninth day of September, A. D. 1890, your orator gave
40 notice to said Packard of said order and payment; that a copy of said order and of said notice are hereto annexed. On the trial before the jury it was

formally announced on the part of your orator to the Court and jury that it was the design of the railway company to fill up the canal by an embankment on the right-of-way, and damages were claimed on the part of said Packard for the destruction of the canal scheme by the railway, and the question of the amount of such damage was submitted by the Court to the jury, as by a copy of said charge of said Judge offered herewith as an exhibit will more fully appear. 10

4. A portion of the said right-of-way on the land of said Packard is within the lines of a street called now East 28th street, which has not been graded or marked out and is a part of the salt marsh, but is alleged to have been formally opened by an ordinance approved March 19th, 1873, whereby said street was ordained to be opened from the line of Avenue A to the line of Avenue G. Avenue G has not been opened. At the meeting of the Bayonne City Council, held on the sixth day of May, A. D. 1890, being the next meeting held after the verdict of the jury, which was rendered May 2d, said Packard applied to the Council to vacate certain streets to make way for his canal, not including East 28th street; and for leave to grade East 28th street from his west boundary to the line of said canal, and to build a draw-bridge twenty-five (25) feet wide across his canal within the lines of said street, the said draw-bridge being entirely and the said grading partly on the right-of-way of your orator. On the same evening, without notice to your orator and without its consent or knowledge, the Council passed a resolution, afterwards approved by the Mayor, as follows: 20 30

"Resolved, that the communication of R. G. Packard, Esq., be received and filed; also

"Resolved, that said R. G. Packard be, and he is hereby authorized and empowered at his own cost and expense to grade to the established grade, East 28th street, from the westernmost boundary of his land to the westernmost side of the canal or basin be- 40

ing constructed by him, and to build, construct and maintain a suitable draw-bridge of not less than 25 feet in width in the line of said street and across said canal or basin, all to be done under the supervision of the city engineer and in conformity with plans officially approved by him, and whose fees are to be paid by said R. G. Packard, Esq.; also

10 "Resolved, that on the completion of the draw-bridge as above said R. G. Packard, Esq., shall be relieved from further improvement of that portion of East 28th street over said canal or basin."

The map hereto annexed is a copy of that appended to the application of said Packard except that the location of the railway route has been shown thereon.

5. The proposed draw-bridge extends diagonally
20 nearly across your orator's right-of-way and with the usual approaches would completely obstruct it. An over-head crossing sufficiently lofty to clear a draw-bridge constructed in the usual manner would involve an immense expense if practicable, and is impracticable for your orator by reason of the fact that its grades must conform to those of the Central Railroad a short distance to the north. The relative location of said street, railway route, canal and draw-bridge appear by reference to said map, a copy
30 of which is annexed to the bill.

5 1-2. And your orator furthershows that the construction of said-draw bridge would, at the present time, serve no public purpose; that the end of East Twenty-eighth street on the former line of Avenue G, so-called, is in the salt marsh at a place entirely impassable for horses; that there are no opened streets within a distance of over a quarter of a mile from the eastern end of said street and draw-bridge in an
40 easterly or southerly direction; that the nearest upland or hard ground is about a quarter of a mile

distant from the eastern end of said draw-bridge, and that said upland, though within city limits, is still used only for farming purposes, and that a salt creek about thirty feet wide runs between the eastern end of said draw-bridge and the said upland, making the passing to and from said-draw bridge and said upland more impassable.

6. Soon after the rendering of said verdict negotiations were entered into between your orator and Packard with a view to changing the route of the railway to land to be provided by Packard, but no definite offer has been or can be obtained by your orator from him, and during the month of August last he renewed excavation of his basin with his dredge south of the line of the railway, and in the territory which will be cut off by the railway which excavation he had suspended upon the rendering of the verdict. No work has yet been done toward the grading of East Twenty-eighth street or the construction of the draw-bridge therein. Your orator desires to enter upon the construction of its railroad and to occupy the whole of its right-of way subject to the proper rights of the public if any in said street, but is threatened with interference by said Packard by the building of said draw-bridge. Your orator shows that the construction of a railroad upon that part of the right-of-way not included within the street is a complete obstruction to the canal and necessarily destroys it, that your orator has paid for the privilege of thus destroying it, and that a draw-bridge constructed according to the resolution would be idle and useless except as an obstruction to your orator terminating in the salt marsh a long distance from any upland and on your orator's right-of-way, at a point where no street has been opened. And your orator charges that the said resolutions were applied for and passed with intent to interfere with the lawful rights of your orator to construct its railroad and to deprive your orator of the

property which he had been placed by the verdict of the jury under a fixed liability to pay for and which your orator has acquired by a title which relates back to the 13th day of March A. D. 1890; that the resolutions were unauthorized by the charter of the City of Bayonne and were unreasonable, unlawful and void, that any such work should be done by ordinance, as by reference to the charter of the city of
10 Bayonne offered herewith as an exhibit, will more fully appear.

Your orator prays that Ralph G. Packard may without oath answer the premises and that he may be restrained by this Court from grading East 28th street or any part thereof on the right of-way-of the Bergen Neck Railway Company and from constructing a draw-bridge thereon or interfering with your orator in the construction of its railroad on said land and that your orator may have such other
20 and further relief in the premises as may be agreeable to equity.

May it please your Honor the premises considered to grant unto your orator not only the writ of injunction commanding the said Ralph G. Packard, his servants, agents and attorneys to refrain from grading East 28th street or any part thereof on the right-of-way of the Bergen Neck Railway Company and from constructing a draw-bridge thereon and from interfering with said company in the construction of
30 its railroad thereon, but also the writ of subpœna to be addressed to said Ralph G. Packard commanding him to appear and answer the premises and abide the further order of the Court.

DICKINSON & THOMPSON,
Sol'rs of Complt.

Chas. D. Thompson, of Counsel.

40 State of New Jersey, ss.:

Fred M. Slater, being duly sworn, on his oath says: I am Chief Engineer of the Bergen Neck

NEW YORK BAY

NOTE.
Dotted lines denotes Streets and Avenue to be Vacated.

E. 30TH ST. 70

213.12

213.73

70 200 70

E. 29TH ST. 60

206.15

E. 28TH ST. 50

ST. DRAW BRIDGE

HIGH WATER LINE

BERGEN NECK RAILWAY LINE

ST.

70

E. 27TH

200

E. 27TH ST. 50

60

227.36

F. 200 G.

E 26TH ST.

E. 26TH ST. 50

BASIN

60

200

AVENUE

275.93

NEW ST. 50

E. 25TH ST.

60

AVENUE 199 AVENUE

H

256.26

E 25TH ST. 80

E. 24TH ST.

60

200

251.2

E 24TH ST. 60

ST.

70 60

200

70 200 70

E. 23RD

60 E. 23RD ST.

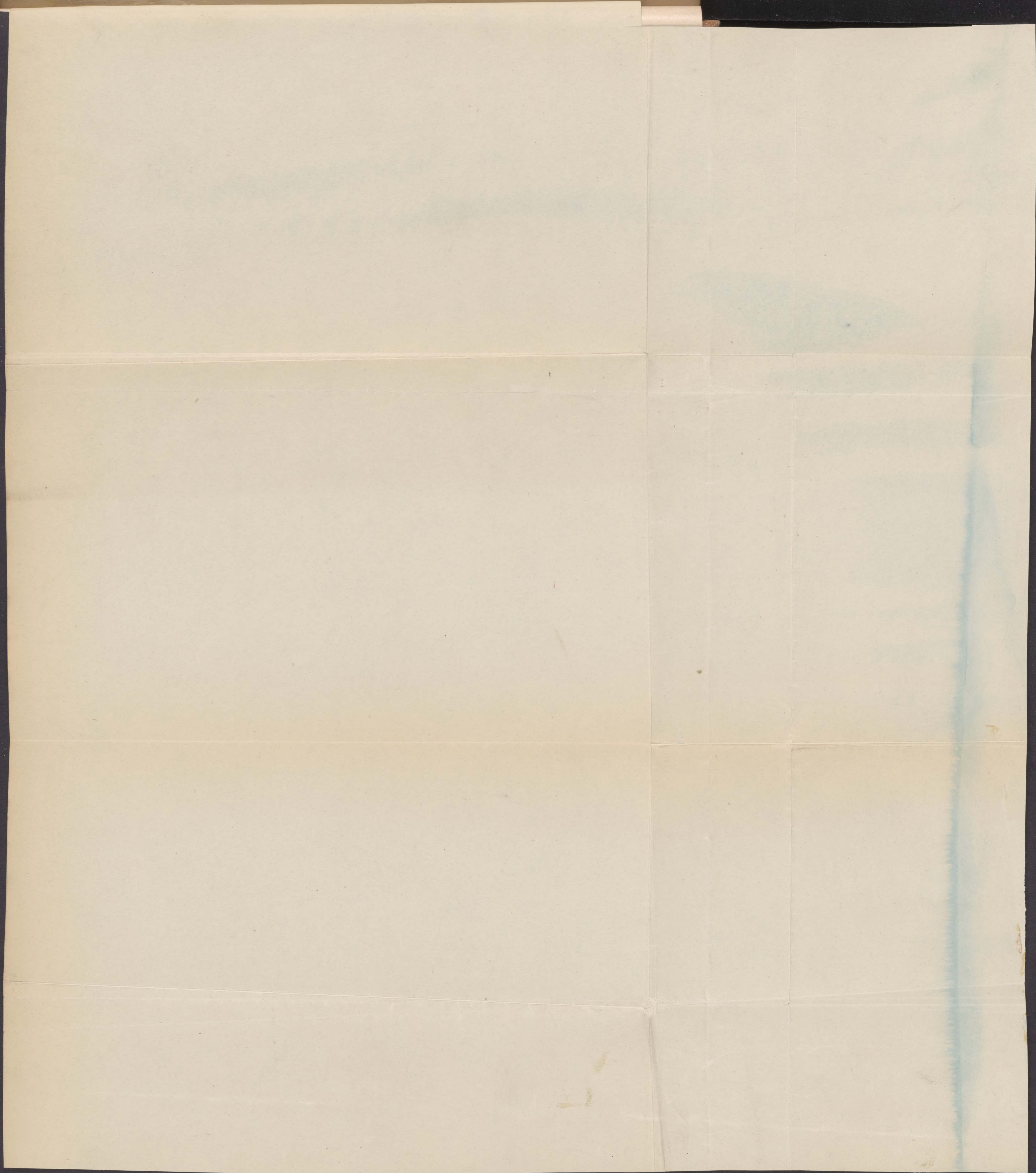
70

200 200 G

60 MECHANIC ST.

AVE. CENTRAL AV.

SCALE 200 FEET = ONE INCH.



Railway Company, and have held that position since its organization, and have been fully cognizant of its operations. The matters set forth in the foregoing bill, so far as they relate to the acts of the company, are true, and, so far as they relate to the acts of others, I believe them to be true. The certificate of incorporation was filed July 20, 1885, and the survey of its location on the same day.

In the fall of 1889 an effort was made by the officers 10 of the company to purchase land of Ralph G. Packard, being a tract of salt meadow in the City of Bayonne, near New York Bay, included within the right-of-way. The negotiation was postponed from time to time by Mr. Packard on various pretexts until January, 1890, when he began to excavate a canal or basin one hundred and fifty feet wide from New York Bay through the salt meadow across the right-of-way. Thereupon the company began proceedings to condemn and the commissioners appointed made their 20 report, dated and filed on the thirteenth day of March, A. D. 1890, making an award to Ralph G. Packard for the value of his land taken, being in area one and 894-1000 acres, and for damages to the residue of his tract. From this report an appeal was taken and was tried at the April Term, 1890, of the Hudson Circuit, and a verdict was rendered in favor of Ralph G. Packard and against the Bergen Neck Railway Company for seventeen thousand dollars value and damages on the second 30 day of May, A. D. eighteen hundred and ninety, for which judgment has since been entered. On the trial it was shown that the proposed railroad crossed the proposed canal near its outlet in New York Bay, and it was announced formally to the Court and jury by the counsel for the company that it was the design of the railway company to fill up the canal. Damages were claimed on behalf of Mr. Packard for the destruction of the scheme and for the loss of the money which had been expended thereon, and 40 the question of the amount of such damages was submitted by the Court to the jury.

After the rendering of said verdict and on the sixth day of May, A. D. eighteen hundred and ninety, said Packard applied to the Bayonne City Council to vacate certain streets to make way for his canal and for leave to grade East 28th street from his west boundary to the line of said canal, and to build a draw-bridge twenty-five feet wide across his canal within the lines of said street. The
10 width of the canal and the length of the proposed draw-bridge were not stated, but according to the plan accompanying his application the draw-bridge was to be about one hundred and fifty feet long. On the same evening when this communication was received, May 6, 1890, without notice to the Bergen Neck Railway Company, the Bayonne City Council passed the resolutions, a copy of which is set forth in the foregoing bill, as appears by their minutes officially printed and published, which resolutions
20 were afterwards approved by the Mayor of the city.

The draw-bridge thus authorized if constructed would stand entirely on the right-of-way of the Bergen Neck Railway Company, and would occupy a part of the same land taken from Ralph G. Packard in the condemnation proceeding, and the grading authorized would also be in part on the right-of-way.

The construction of such a draw-bridge in the
30 usual manner would block the railroad across the land occupied by the draw-bridge and would not only make it impossible to build on a level with the street grade, but would make it impracticable to build above it, in view of the grades necessary to pass under streets on other parts of the line in the vicinity. The map hereto annexed is a copy of that referred to in the application of Mr. Packard except that the route of the Bergen Neck Railway Company has been indicated thereon by me. Avenue A shown
40 on said map is not an opened street. East 28th street is claimed to have been opened in 1873, but

has never been graded, and ends on the east at Avenue G in a marsh impassable for horses. The proposed draw-bridge would terminate on the right-of-way of the Bergen Neck Railway Company on land not within any street. The Bergen Neck Railway Company has paid several hundred thousand dollars for the purchase of rights-of-way on both sides of said land of Packard and is ready to complete the construction of its railway thereon, but is 10 threatened with interference by said Packard under color of the resolution above copied. Nothing has yet been done on the ground towards the grading of 28th street or the construction of the draw-bridge, but within the last few weeks Mr. Packard has renewed dredging in the basin south of the right-of-way, which he had discontinued after the verdict, and is using the channel across the right-of-way as a water way to reach the basin within and is carrying on the work with the evident intention of maintain- 20 ing a water way across the right-of-way.

F. M. SLATER.

Sworn to and subscribed at Jersey City, this 27th day September, A. D. 1890, before me.

James Murphy, Jr.
Notary Public for New Jersey.

30

State of New Jersey, ss.:

Charles D. Thompson, being duly sworn on his oath, says that pursuant to the order of the Chancellor, dated September 26th, 1890, he paid to the Clerk in Chancery the sum of seventeen thousand four hundred and sixty-two 43-100 dollars, which payment was made by deponent on behalf of the Bergen Neck Railway Company, on the 27th day of September, A.D. 1890.

And deponent further says, that on the twenty- 40 ninth day of September, A.D. eighteen hundred and

ninety, he served notice of such payment, a copy whereof is hereto annexed, dated September 27, 1890, upon Ralph G. Packard by giving the same to him personally, at the same time stating to him its nature and contents.

CHAS. D. THOMPSON.

Subscribed and sworn to at Jersey City, this 29th day of September, A.D. 1890, before me,

OSCAR KEEN,
M. C. C. of N. J.

10

STATE OF NEW JERSEY, ss.:

James Murphy, Jr., being duly sworn on his oath, says that he examined and copied the written communication of Ralph G. Packard presented at the meeting of the Bayonne Common Council on the evening of May 6, 1890, on file with the City Clerk, and the resolutions of the Council relative thereto, and that the following is a correct copy of said communication, and that the copy of said resolutions in the bill is correct:

20

NEW YORK, May 6, 1890.

30 To the Hon. Mayor and Council of Bayonne, N. J.:

GENTLEMEN—I am constructing a tide-water canal or basin in your city on property owned by me, and find in order to complete the same portions of certain streets and avenues will have to be vacated. Since this basin is practically in the heart of the city and will when dredged to the contemplated depth of 20 feet at mean low water bring a large tract of unimproved property into commercial use; the speedy completion of the enterprise is of equal advantage to both your city and myself. I therefore respectfully request your Hon. body to permit me to

40

grade East 28th street from the westernmost boundary of my land to the westernmost side of said canal or basin and to build and maintain a draw-bridge of not over 25 feet in width in the line of said street and across said canal or basin. And that when said street is so graded and bridged it shall relieve me from further improvement of that part of the same over said canal or basin. I also request that Avenue G, from East 23rd street northwardly, be 10 changed in location in manner following: The center line to be 270 feet eastwardly from and parallel with the center line of Avenue F, to be 70 feet in width and to extend from East 23rd street northwardly to New York Bay. I further request the vacation of the portions of the following described streets:

East Twenty-fourth street between the easternmost line of Avenue G, as herein petitioned to be changed in location and the westernmost line of Avenue H.

East Twenty-fifth street between the easternmost 20 line of Avenue G, as herein petitioned to be changed in location and the westernmost line of Avenue H.

New street, eastwardly of the easternmost line of Avenue G, as herein petitioned to be changed in location.

East Twenty-sixth street between the easternmost line of Avenue G, as herein petitioned to be changed in location and the westernmost line of Avenue H.

East Twenty-seventh street between the easternmost line of Avenue G, as herein petitioned to be 30 changed in location and the westermost line of Avenue H.

East Twenty-ninth street eastwardly of the easternmost line of Avenue G, as herein petitioned to be changed in location.

Reference to the map hereto attached will show what is above applied for and will also demonstrate the fact that notwithstanding the street vacations herein asked for, the proposed draw-bridge in the line of East Twenty-eighth street will bring the entire 40 city into direct communication with the canal or basin.

The construction of this canal or basin will add very greatly to values of Bayonne property and give to its citizens facilities unsurpassed by any city in the State for landing merchandise in a practically central location. To demonstrate the immense increase in values resulting from improvements of this character I need only to direct your attention to the Wallabout and Gowanus Canals in Brooklyn for
10 which the City of Brooklyn issued one million five hundred thousand dollars of bonds to assist in paying for their cost. In this project I ask no financial aid from your city, and hereby agree to pay all costs of every description necessary or required in connection therewith. I request only the co-operation of the city authorities in the matters above set forth, and prompt action hereon is therefore politely and earnestly urged.

Very res'y,

20 R. G. PACKARD.

This is to certify that I have examined the proposed change of location and vacation of the streets and avenues above set forth, and represent some six acres of property affected thereby. I hereby endorse and approve of all said asked for changes.

Bayonne City, May 6, 1890.

M. J. CURRIE.

30

And deponent further says that the annexed plan is a true copy of that annexed to the petition, except that the annexed plan shows in addition the location of the route of the Bergen Neck Railway Company.

JAMES MURPHY, Jr.

Sworn to and subscribed at Jersey City, this 27th day of September, A. D. 1890, before me.

40 CHARLES B. HUGHES,
Master in Chancery of N. J.

State of New Jersey, }
Hudson County. } ss.:

Charles D. Thompson, being duly sworn according to law, on his oath says, that he is familiar with the location of the lands of the said Ralph G. Packard, taken by The Bergen Neck Railway Company; that the lands upon which the said draw-bridge is to be placed according to the plans as proposed by the said Ralph G. Packard is a salt marsh, and that the 10 end of East 28th street stops at the former line of avenue as shown upon said map.

That the lands in that vicinity as a salt marsh are entirely impassable for horses, and that there are no open streets within a distance of over a quarter of a mile from the eastern end of said street in an easterly or southerly direction, and that the nearest upland or hard ground is about twelve hundred feet distant from the eastern end of said draw-bridge, and that the said upland although within the city limits is used 20 only for farming purposes, and that a creek called Van Boskerk Creek, about thirty feet in width, runs between the end of said draw-bridge and said upland, making the passage to and from said draw-bridge of said upland impossible.

CHAS. D. THOMPSON.

Sworn and subscribed this }
29th day of September, }
A. D. 1890, before me. }

Wm. G. Bumsted, 30
Master in Chancery
of New Jersey.

40

IN CHANCERY OF NEW JERSEY.

Between—	
10 THE BERGEN NECK RAILWAY COMPANY, Compl't, and RALPH G. PACKARD and others, Def'dts.	Order.

20

Upon reading and filing the bill of the Bergen Neck Railway setting forth that said company has taken for the purposes of its railway certain lands of the said Ralph G. Packard, pursuant to an act entitled, "An act to authorize the formation of railroad corporations and regulate the same," approved April 2d, A. D. 1873, and that commissioners have been appointed by a Justice of the Supreme Court to appraise said lands and assess the damages, who have 30 duly qualified, and having heard all the parties interested therein, and that an award was duly made and an appeal taken therefrom to the Circuit Court of the County of Hudson, and that the same was duly tried before a jury of the said county and a verdict rendered thereon, and it was thereby adjudged that the value of said lands and the damages amount to the sum of seventeen thousand dollars ($17,000) and forty-two dollars and six cents ($42.06) for costs of said suit; and it appearing that the lands are encum- 40 bered by mortgages and tax liens, and that a portion thereof has been sold to the Bayonne City Terminal

Railway Company, it is thereupon, on motion of Dickinson & Thompson, of counsel with the said company, on this twenty-sixth day of September, eighteen hundred and ninety, ordered that the said sum so adjudged to be paid for the value of said lands and damages may be paid into the Court of Chancery pursuant to the provisions of the act entitled, "An act respecting awards of commissioners in cases of lands and real estate taken and condemned 10 by law and appeals therefrom," approved March 2d, A. D. 1877.

ALEX. T. McGILL,
C.

IN CHANCERY OF NEW JERSEY. 20

Between— THE BERGEN NECK RAILWAY COMPANY, Compl'ts, and RALPH G. PACKARD et al., Def'dts.	Notice.

30

Take notice that the amount of the judgment entered upon the verdict of the jury on the trial of the appeals from the award of Benjamin Edge, Charles H. O'Neill and John Garrick, commissioners, to be paid by the Bergen Neck Railway Company, amounting with costs to the sum of seventeen thousand and 40 forty-two dollars and six cents ($17,042.06) together

with interest thereon from the second day of May, eighteen hundred and ninety, the date of said verdict, to the twenty-seventh day of September, eighteen hundred and ninety, amounting to the sum of four hundred and twenty dollars and thirty-seven cents has been paid by said The Bergen Neck Railway Company into the Court of Chancery pursuant to an order of the Chancellor bearing date the twenty-
10 sixth day of September, eighteen hundred and ninety, made in the above entitled cause and directing and authorizing such payment.

Dated September 27, 1890.

THE BERGEN NECK RAILWAY COMPANY,
By DICKINSON & THOMPSON,
Solrs. and of Counsel.

To

RALPH G. PACKARD,
THE BAYONNE CITY TERMINAL RAILWAY COMPANY
20 and others and their Attorneys.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

Chas. D. Thompson, of full age, being duly sworn on his oath according to law, saith that on the twenty-ninth day of September, A. D. 1890 he served the written notice on Ralph G. Packard individually, and also upon the said Ralph G. Packard, as a di-
30 rector of The Bayonne City Terminal Railway Company, by delivering the same to him personally and explaining to him the contents thereof.

CHAS. D. THOMPSON.

Sworn and subscribed this 29th day of September, A. D. 1890, at Jersey City, before me,

WILLARD P. VOORHEES,
Master of Chancery
of N. J.

40

State of New Jersey, ss.:

Charles D. Thompson, being duly sworn on his oath says: I am counsel for the Bergen Neck Railway Company, and had charge of its condemnation proceedings referred to in the foregoing bill. The award of commissioners was made March 13th, 1890, and on appeal therefrom the case was submitted to the jury on the second day of May, A. D. 1890, and the jury rendered their verdict late the same night for seventeen thousand dollars value and damages. On the evening of the sixth of May, 1890, the resolutions copied in the foregoing bill were passed by the Bayonne Council and several days later came to my knowledge, but before I could take any action on behalf of the company negotiations were opened between Mr. Packard and the company and it was agreed between Mr. Fuller, counsel for Mr. Packard, and myself that nothing should be done to disturb the existing status, until the negotiations should terminate. The negotiations came to an end without result Sept. 27th, 1890, and in the interval I took no proceedings to prevent the interference threatened by the resolutions referred to, because of the understanding.

On Saturday, Sept. 27th, 1890, I paid into the hands of the Clerk in Chancery the amount of the award as fixed by the jury with interest and costs which payment was made by authority of the Chancellor by his order pursuant to the statute, the said land being encumbered.

CHAS. D. THOMPSON.

Sworn and subscribed this 29th day of September, A. D. 1890, before me at Jersey City,

Oscar Keen, M. C. C. of N. J.

EXHIBITS OFFERED AT TIME OF FILING BILL.

EXHIBIT C, No. 1.

ARTICLES OF ASSOCIATION OF THE BERGEN NECK RAILWAY CO.

10

~~Admitted to be regular and not~~ printed.
on pages 111–119

EXHIBIT C, No. 2.

20

SURVEY OF ROUTE AND LOCATION OF BERGEN NECK RAILWAY.

Admitted to cross lands in question upon the line described in bill and shown on map and not printed.

30

EXHIBIT C, No. 3.

CERTIFIED COPY.

Proceedings to condemn lands of R. G. Packard.

Synopsis of proceedings to condemn lands of R. G. Packard.

January 11, 1890. Petition presented to Hon. M.
40 M. Knapp, who fixed January 22d, as the day when commissioners would be appointed.

Notice of the time and place assigned for hearing application for appointment of commissioners with a copy of the map and description of the land annexed served on Mr. Packard and others named therein, same day.

January 22d, 1890. Charles H. O'Neill, John Garrick and Benjamin Edge, appointed commissioners.

10

January 23d, 1890. Commissioners duly sworn, and set February 3d as the day when they would view the land, &c.

January 23, 1890. Notice of the meeting of the commissioners served on landowner.

February 3d, 1890. Commissioners met and viewed the land.

March 13, 1890. Award made and signed, value $3000 ; damages $2000.

20

March 13th, 189C. Petition of appeal filed by Ralph G. Packard.

March 15th, 1890. Award duly filed in County Clerk's Office.

March 28th, 1890. Appeal filed by Railway Co.

March 29th, 1890. Order made by Hon. M. M. Knapp, judge, forming an issue, and directing that jury be struck.

April 30th, 1890. Appeal tried before Hon. J. Dixon, judge, and a struck jury.

30

May 2d, 1890. Verdict rendered fixing value and damage at $17,000.

Sept. 6th, 1890. Judgment entered for $17,000 damages, and $42.06 costs.

40

EXHIBIT C, No. 4.

Charge of Dixon, J., on Trial on Appeal at Hudson Circuit.

Gentlemen of the Jury—My duty in this matter is a simple one and will be performed very briefly.
10 The laborious end of the case is yours. It is to be decided in accordance with a few plain principles of law, but by the application of good sound judgment to a considerable number of elements of fact; and because there were various considerations of facts to be subjected to your judgment counsel have had whatever time they felt desirous of occupying to explain them to you, and I shall not undertake either to reiterate, amplify or condense the matters they have addressed to your sound judgment as business
20 men.

On the thirteenth of March last the Bergen Neck Railway Company took from Mr. Packard a strip of land through his property in the neighborhood of Constable Hook, and under the constitution and laws of this State the company became bound to make just compensation to him therefor by paying him the value of the land that they took and the damages done by taking it.

30 Sometimes it is helpful, convenient for the jury to attempt to ascertain the value of the land taken and the damages done by considering the two separately, and you may think it so in this case, but my impression is that under the circumstances of this case the simpler method will be to ask what the aggregate of the two is without undertaking to discriminate between value and damages, and if you think that is the simpler question for you to answer, the simpler
40 form in which to present the problem to your minds, the law permits you to do that. You are not bound in your verdict to declare two sums, the one repre-

senting value the other damages; you may declare one sum representing the aggregate of both. And if you conclude to present one sum only, then the question may very properly be presented to your minds in this way: What was the fair market value of the property owned by Mr. Packard and affected by this condemnation just as it stood on the thirteenth of March, and what would have been the fair market value of that same property if on that day this railroad had been constructed across it upon an embankment not over six feet above high water? The difference between those two sums would represent the compensation to be awarded in this case—the fair market value. That is the enquiry. Not the prospective value; not the speculative value; not the possible profits to be made out of retaining it; not the cost to the owner either in the way of purchase or improvement, but the fair market value at that time. The cost expended by the owner in purchasing it and improving it, and possible profits to him out of the retention of title to it may be matters of consideration bearing upon this matter of value; but the point of enquiry is not those collateral matters, but directly this: What was the fair market value of the property of Mr. Packard affected by this condemnation on that day; what would a reasonable purchaser have been willing to pay in cash for it that day if it had been put in the market for sale? Then what would have been the fair market value on that day if this railroad had been constructed and in operation across it? The difference between those two sums would make Mr. Packard whole, and that is what your verdict should do.

Now, then, I have spoken of the land affected by this condemnation. That may or may not mean the whole of the land that Mr. Packard had in that neighborhood. He owned thirty-three or thirty-four acres, I think, across the meadow, and he owned

also the land under water which you have seen depicted on some of these maps, running out to the exterior line of piers. He had under way a project for the improvement, he says, of the entire tract. In his mind it was all a part of one scheme. But it does not necessarily follow that it is to be treated by the jury as therefore an entirety, simply because Mr. Packard viewed it as an entirety for his own
10 purposes. Only so much of this tract is to be regarded by the jury as an entirety as in their judgment was useful for the scheme, and so much as Mr. Packard had the right to devote to the scheme. How much was reasonably useful for his plan is wholly for you. How much he had a right to devote to the scheme is partly for me, because it appears in this case there were public streets laid out and opened, and the grade of them established over portions of this property, and it is the
20 duty of the Court to say to you that Mr. Packard had no right to construct a canal or a basin across a public street, and that his scheme, his project, whatever it was, must be so far restricted as that circumstance would restrict it. He had no right to construct basins or canals across public streets, and so far as his plan contemplated the doing of that it must be set aside, and it can be regarded by you as a feasible plan only so far as it could be carried out consistently with the public use of the highway. It
30 may be said that he might some time have acquired a permission from the public authorities to excavate the streets to make a canal or basin there, but that is problematic, and the law in these condemnations does not deal with problematic matters; it does not deal with possible rights that parties may acquire hereafter, but taking the rights that they actually possess at the time of the condemnation, it deals with those rights, and whatever schemes they have adopted in subserviency to those rights, in furtherance of those
40 rights, and makes them compensation for whatever is taken from them in view of those existing rights. It

is impossible for a jury to go beyond that. How can you possibly tell whether the City of Bayonne would ever give to Mr. Packard the right to build canals and basins in the public street? On what data could you decide such a question? You cannot decide it; I cannot decide it, and the law says we need not decide it. We simply deal with the rights he then had, and so far as his plans were in accordance with the rights that he then had you are entitled to consider 10 them and fix his compensation in view of them, but beyond those rights his scheme must give away.

Now, gentlemen, beyond these matters every consideration in the cause I think is for you. I remember no suggestion from counsel, and I think of no other question in the cause with which I have a right to deal.

It is for you to say what will be fair compensation to this landowner for the land taken and the damage done, and that fair compensation may be measured 20 by the difference between the fair market value of his property as it stood on the 13th of March last and the fair market value of his property as it would then have been if this railroad had been constructed and in operation across it. That difference will properly represent your verdict.

Sworn to by John A. Nugent, stenographer.

Affidavit omitted.

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EXHIBIT C, No. 5.

Bill in Chancery to Pay Money into Court.

10 In Chancery of New Jersey.

To the Hon. Alexander T. McGill, Chancellor of the State of New Jersey:

The Bergen Neck Railway Company respectfully shows unto your Honor—

That said company is a corporation organized under the general laws of the State of New Jersey, under the provisions of an act entitled "An Act to 20 authorize the formation of railroad corporations and regulate the same," approved April 2nd, 1873, and the supplements thereto.

That the articles of association were filed, and due payment made to the Treasurer of the State, and all things requisite to the incorporation of said company were done on the twentieth day of July, eighteen hundred and eighty-five, and on the same day the said company duly deposited in the office of the Secretary of State a survey of its route and location 30 and took pursuant to said act for a part of the route and location, the following described lands owned by Ralph G. Packard, that is to say:

Description of land—

All that piece or parcel of land situated in the City of Bayonne, in the County of Hudson and State of New Jersey; the same being the proposed route of the railroad of The Bergen Neck Railway Company, 40 located, bounded and described as follows:

Beginning at station number two hundred and one

plus forty-seven and ninety-four one-hundredths (201 plus 47 94-100) of the center line numbers of said proposed railroad, said station being on the division line between lands of said Ralph G. Packard and lands of the Bergen Neck Railway Company.

Thence (1) south forty-six degrees forty minutes and thirty seconds (46° 40′ 30″), west along said division line a distance of fifty-five and thirteen one- 10 hundredths (55 13-100) feet to a point in the westerly right-of-way line of the said proposed railroad.

Thence (2) curving in a southeasterly direction on a radius of eight hundred and sixty-nine (869) feet, along the westerly right-of-way line a distance of two hundred and fifty-seven and sixteen one-hun-hundredths (257 16-100) feet, to a point fifty (50) feet at right angle southwesterly from station two hundred and four plus twelve and seventy-three 20 one-hundredths (204 plus 12 73-100) of the center line numbers of said proposed railroad.

Thence (3) on a tangent to said curve, south thirty-five degrees fifty-six minutes (35° 56′), east along said southwesterly line of said proposed railroad, parallel to the center line thereof and distant fifty (50) feet therefrom, a distance of one hundred and seventy-five and twelve one-hundredths (175 12-100) feet to the center of Van Boskerk Creek.

Thence (4) down said creek in the center thereof, 30 north seventy-three degrees fifteen minutes (73° 15′), east a distance of seventy-two (72) feet to a turn in said creek, crossing the center line of said proposed railroad at station number two hundred and six plus five and twenty-five one-hundredths (206 plus 05 25-100) of said center line numbers.

Thence (5) still along the center of said creek, south thirty-five degrees fifty-six minutes (35° 56′), east a distance of one hundred and eight and eighteen one-hundredths (108 18-100) feet to another turn in 40 said creek.

Thence (6) still along the center of said creek south eight degrees and thirty-five minutes (8° 35′), west a distance of ninety-six and ninety-nine one-hundredths (96 99-100) feet to the said southwesterly line of said proposed route, and crossing the center line of said railroad at station number two hundred and seven plus thirty-eight (207 plus 38) of the center line numbers of said proposed railroad.

10 Thence (7) south thirty-five degrees fifty-six minutes (35° 56′), east along the southwesterly line of said proposed route, parallel with the center line of said proposed railroad and distant fifty (50) feet therefrom a distance of two hundred and seventy-three and forty-nine one-hundredths (273 49-100) feet to the division line between the lands of the said Ralph G. Packard and lands lately belonging to one Peter C. Doremus, deceased.

Thence (8) along said division line north seventy-20 two degrees four minutes (72° 4′), east a distance of one hundred and five and fifteen one-hundredths (105 15-100) feet, crossing said center line of said proposed railroad at station number two hundred and ten plus seventy-eight and fifty-nine one-hundredths (210+78 59-100) of the center line numbers of said proposed railroad.

Thence (9) north thirty-five degrees fifty-six minutes (35° 56′), west along the northeasterly line of said proposed route, parallel with the center line of 30 said proposed railroad and distant fifty (50) feet therefrom six hundred and eighty-two and eleven one-hundredths (682 11-100) feet.

Thence (10) curving in a northwesterly direction on a radius of seven hundred and sixty-nine (769) feet, a distance of two hundred and seventy-three and sixty-four one-hundredths (273 64-100) feet to the division line first above mentioned.

Thence (11) along said division line south forty-six degrees forty minutes and thirty seconds (46° 40′ 40 30″), west a distance of fifty-five and ninety-six one-hundredths (55 96-100) feet to the place of beginning.

Comprising one acre and eight hundred and ninety-four one-thousandths (1.894) of an acre.

And your orator further shows that on or about the first day of July, in the year 1876, one James Binns executed a mortgage to one Samuel Mount, covering said land, together with other property therein described, which said mortgage was duly recorded in the Register's office in the County of Hudson, in Liber 131, of Mortgages, Page 299, etc., that 10 afterwards and on about the ninth day of July, 1879, the said Samuel C. Mount, by an instrument in writing, under his hand and seal, duly assigned an undivided half interest in said mortgage to one Elizabeth Binns, which said deed of assignment was duly recorded in the Register's office of the County of Hudson, in Liber 331, Assignment of Mortgages, Page 178, as by reference thereto will more fully appear.

And your orator further shows that, so far as ap- 20 pears by the records of said County of Hudson, the said mortgage is still a lien on the said premises above described, and is still in possession, ownership and control of the said Elizabeth Binns.

And your orator further shows that the said Elizabeth Binns resides in the City of Brooklyn, State of New York.

And your orator further shows that on the 23rd day of January, 1890, the said Ralph G. Packard, Harriet L., his wife, executed a mortgage on a part 30 of the property above described to one Asa W. Parker to secure the sum of $9,250; the said mortgage was duly recorded in the Register's office of the County of Hudson, in Liber 237 of Mortgages, page 448, as by reference thereto will more fully appear.

And your orator further shows that afterwards, on or about the fifteenth day of May, 1890, the said Asa W. Parker, by deed of assignment, under his hand and seal assigned the said mortgage to the said Harriet L. Packard, the wife of the said Ralph G. 40 Packard, which said deed of assignment is duly re-

corded in Liber 53 of Assignments of Mortgages, page 78, as by reference thereto will more fully appear. Whereby the said Harriet L. Packard claims to have some lien upon the said premises, or a part thereof.

And your orator further shows that on the 23d day of January, 1890, and after the execution of the above mortgage made by the said Ralph G. Packard
10 to the said Asa W. Parker, the said Ralph G. Packard and wife conveyed a portion of said land to the Bayonne City Terminal Railway Company, a corporation of the State of New Jersey, which said deed was duly recorded in the Register's office of the County of Hudson, in Liber 494 of Deeds, page 479.

And your orator further shows that the said lands above described are encumbered by tax liens for taxes in arrears upon said premises and due to the Mayor and Council of the City of Bayonne.

20 And your orator further shows that in order to determine the value of the land so taken and above described, Benjamin Edge, John Garrick and Charles H. O'Neill, were duly appointeded commissioners by the Honorable Manning Knapp, one of the Justices of the Supreme Court of this State, by an order made on the twenty-second day of January, 1890, to examine and appraise said lands, assess the damages to the owners thereof for the same; and the said commissioners having been duly sworn and qualified
30 and having on notice to the owners and parties interested therein, and in their presence viewed the said land, and heard all the parties who appeared before them, made their award on the thirteenth day of March, 1890, whereby they fixed the value and damages for the said land and premises at the sum of $5000.

And your orator further shows that afterwards an appeal was taken from the said award by the said Ralph G. Packard to the Circuit Court of the
40 County of Hudson, and such further proceedings were had therein that an issue was framed and the

said cause was noticed for trial at the April Term of said Court, and a jury having been struck, and the appeal having been moved, the same was tried on the 30th day of April, 1890, and on the second day of May, 1890, the said jury rendered a verdict, fixing the value of said lands and damages to the owners thereof at the sum of $17,000, and that judgment has been entered for such sum together with the sum of $42.06, the taxed cost of said trial against the Bergen Neck Railway Company. 10

Your orator further shows that, in as much as the said land is encumbered by the said mortgages, one held by said Elizabeth Binns and the other held by the said Harriet L. Packard, and, in as much as a portion thereof has been sold pending these proceedings through the Bayonne City Terminal Railway Co., and, in as much as the same is also encumbered by the liens of taxes, your orator is desirous of paying the money awarded by said proceedings to the 20 owner of said lands into this Honorable Court, there to be distributed according to law and in such manner as shall be equitable and just, in order that your orator may be relieved from the lien of the said mortgages, and of said assessment for taxes, and the various liens occasioned thereby, and that the same may also be apportioned in a proper apportionment between the various owners thereof.

Your orator hereby tenders itself ready to pay the said sum of $17,042.06, so adjudged to be due from it 30 to the said Ralph G. Packard for said lands, with interest thereon from the 2d day of May, A. D. '90, under and by virtue of the said provisions of an act of the Legislature of New Jersey, entitled "An Act respecting the awards of commissioners in cases of land and real estate, taken or condemned by law, and appeals therefrom," approved March 9th, A. D. 1877.

Your orator therefore prays that an order may be made permitting it to pay into this Court the 40

sum of $17,042.06 and interest as aforesaid, and that the said sum may be distributed by this honorable Court according to law, and that your orator may have such other and further relief as the nature of the case may require.

To the end, therefore, that the said Ralph G. Packard, Harriet L. Packard, his wife, Elizabeth Binns, the Bayonne City Terminal Railway Co. and Mayor and Council of the City of Bayonne may without oath, to the best and utmost of their respective knowledge, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that the said fund may be distributed between the parties entitled thereto according to law, and in such manner as your orator shall be relieved from the liens of the said Elizabeth Binns, Harriet L. Packard, the Mayor and Council of the City of Bayonne, and that there may be such equitable divisions or apportionment between the said Ralph G. Packard and the Bayonne City Terminal Railway the owners thereof, and that your orator may have such other and further relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

May it please your Honor the premises considered to grant unto your orator the State's writ of subpœna issuing out of and under the seal of this Honorable Court, to be directed to the said Ralph G. Packard, Harriet L. Packard and Elizabeth Binns, the Bayonne City Terminal Railway Company and the Mayor and Council of the City of Bayonne, commanding them and each of them by a certain day and under a certain penalty therein to be expressed, to be and appear before your Honor in this Honorable Court, then and there to answer all and singular the said premises and stand to, abide by and perform such order and decree therein as to your Honor shall seem meet and shall be agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, &c.

DICKINSON & THOMPSON,
Solicitors and of Counsel with
the Complainant.

CHAS. D. THOMPSON,
of Counsel.

10

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. }

Charles D. Thompson, of full age, being duly sworn according to law on his oath, says that he is one of the attorneys of the Bergen Neck Railway Company and that he has had charge of the proceedings in the condemnation of the lands of Ralph G. Packard for the said Bergen Neck Railway Company in the annexed bill particularly set forth; that the matters and things connected therewith, as above set forth, are true. 20

That he has examined the records of Hudson County and that he finds that a portion of said lands above described have been conveyed to the Bayonne City Terminal Railway Company, and that the same are encumbered by mortgages, as in said bill set forth.

CHAS. D. THOMPSON.

Sworn and subscribed the 26th }
day of September, A. D. 1890, }
at Jersey City, before me, } 30
CHAS. C. BLACK,
Master in Chancery
of N. J.

RULE TO SHOW CAUSE AND RESTRAINING ORDER GRANTED ON FILING BILL. 40

Upon reading the bill of complaint in this cause

and the affidavits thereto annexed, and the several exhibits therein referred to, and on motion of Dickinson & Thompson, of counsel with the complainant:

It is, on this twenty-ninth day of September, eighteen hundred and ninety, ordered that the defendant do show cause before the Chancellor at Chancery Chambers, in Jersey City, on the thirteenth day of October next, at the hour of ten o'clock in the fore-
10 noon, or as soon thereafter as counsel can be heard, why an injunction should not issue according to the prayer of said bill, and for such further relief as may be just.

It is further ordered that the said defendant, his servants, workmen, agents, in the meantime and until a further order of this Court in the premises desist and refrain from grading East Twenty-eighth street, in the City of Bayonne, cr any part thereof within the limits of the right-of-way of the Bergen Neck Rail-
20 way Company, and from constructing a draw-bridge thereon or interfering with the complaint in the construction of its railroad on said land.

And it is further ordered that a true but uncertified copy of this order and of said bill and affidavit be served on said defendant within three days from the date of this order.

Respectfully advised.

ALEX. T. McGILL, C.

H. C. PITNEY, V. C.

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Affidavit of R. G. Packard and Order Modifying Restraining Order.

IN CHANCERY OF NEW JERSEY.

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Between— The Bergen Neck Railway Company, and Ralph G. Packard, Defendant.	On Bill, &c.

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State of New Jersey, Hudson County. } ss.:

Ralph G. Packard, the defendant in the above cause, being duly sworn on his oath saith: That on the sixth day of September, eighteen hundred and ninety, the said company entered up judgment in the verdict in the condemnation proceedings, which verdict is referred to in the bill of complaint, and that he has issued a writ of error out of the Supreme Court of New Jersey to remove said cause to said Court, which writ of error bears date the ninth day of September, eighteen hundred and ninety, and was presented to the Judge of the Circuit Court of the County of Hudson in open Court, on the twenty-ninth of September instant, and the return thereto ordered to be made by the Court according to law; deponent means in good faith to prosecute the said writ of error; deponent also saith that if the com- 30 40

plainant is permitted under color of his order to show cause, to go on with his work as he is now doing in filling up the canal which has caused deponent large sums of money, that the injury to him will be irreparable.

R. G. PACKARD.

Sworn and subscribed to before me, this 30th day of September, A. D. 1890.

THOS. S. BEDLE,
[L. S.] Notary Public of N. J.

ORDER.

Upon reading the affidavit of Ralph G. Packard filed herein, it is on this thirtieth day of September, A. D. 1890,

Ordered, that the complainant do desist and refrain from further obstructing the canal excavated by the said defendant until the further order of this Court herein; and that the defendant do desist and refrain from in any way interfering with the obstructions now placed in said canal by the complainant, or from attempting in any way to regain possession of any land of which the complainant is now in possession connected with the *locus in quo* herein. The object and intent of this order is to preserve *in statu quo*, as of the date of the service hereof as hereinafter provided, the rights of the parties hereto in the said *locus in quo*, until said order to show cause shall have been heard and further order shall have been made herein.

And it is further ordered that the said order to show cause be and it hereby is so modified and changed that the return day for the hearing thereof

be made Saturday, the fourth day of October, 1890, at ten o'clock in the forenoon, at the Chancery Chambers in Jersey City, instead of the thirteenth day of October in that place.

And it is further ordered that a copy of this order (which need not be certified) and a similar copy of said affidavit of the defendant be served this day upon the solicitors of the complainant, and that uncertified copies of this order may be served upon the officers and agents or workmen of the complainant, who may be in charge of or concerned in operations at the *locus in quo*. 10

ALEX T. McGILL, C.

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SUPPLEMENTAL AFFIDAVITS USED ON HEARING.

IN CHANCERY OF NEW JERSEY.

Between— The BERGEN NECK RAILWAY COMPANY, Complt, and RALPH G. PACKARD, Deft.	On Bill, &c.

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STATE OF NEW JERSEY, ss.:

Fred M. Slater, being duly sworn, on his oath says that: I am Chief Engineer of the Bergen Neck Rail-

way Company, that on the twenty-ninth day of September instant, by authority of said company, I undertook to enter into possession of that portion of the right-of-way of the Bergen Neck Railway Company which was taken by condemnation from Ralph G. Packard and refered to in the bill filed in this cause, and for that purpose to drive piles on the right-of-way, with a floating pile driver. I found a
10 large dredging machine in the basin shown on the map annexed to the bill, with a long boom pivoted on the dredge, to the end of which a heavy iron dredging bucket weighing many tons was attached by a wire cable so arranged that it could be raised or let fall, which bucket hung over the right-of-way, when directed as it was when I reached the premises and from time to time afterwards during the day, along the line of the canal.

I first gave captain of the dredging machine notice
20 that I proposed to construct the railroad across the canal and warned him to move his dredge. He refused to move, whereupon the pile driver was forced past the dredge and placed upon the right-of-way in the basin with piles, and the men in charge were preparing to drive piles on the right-of-way, when the dredge was moved forward until the bucket was directly over the house over the engine and boiler on the pile driver, when the bucket was let fall with great force several times upon the roof of the house
30 crushing it in, to the peril of the lives of the men therein, and incurring a serious risk of exploding the boiler.

Thereby the workmen on the pile driver were forced to desist from driving piles on the right-of-way, or any part thereof, and were driven off the right-of-way.

This took place before three o'clock in the afternoon. There is no practical way to construct a railroad at that point except driving piles for a founda-
40 tion. The same day about four and a half o'clock in the afternoon I was present, and saw the order made

by the Chancellor on that day, served by Mr. Thompson upon Josiah Packard on the right-of-way adjoining the basin. Mr. Packard was requested by Mr. Thompson to remove the dredge from the right-of-way. This he would not do, but directed the captain of the dredge to do nothing, whereupon by deponent's orders the pile driver was again placed upon the right-of-way and a number of piles were driven there in the evening of September twenty- 10 ninth.

FRED M. SLATER.

Sworn and subscribed at Jersey City, N. J., this 1st day of October, 1890, before me,

GEO. W. CASSEDY,
Master of Chancery of N. J.

STATE OF NEW JERSEY, SS :

Charles D. Thompson, being duly sworn on his oath, 20 says that the order to show cause was granted and restraining order in this cause and the bill marked filed by the Vice Chancellor on the twenty-ninth day of September, between the hours of three and four o'clock in the afternoon.

CHAS. D. THOMPSON.

Subscribed and sworn to this 1st day of October, A. D., 1890, at Jersey City.

GEO. W. CASSEDY, 30
Master in Chancery of N. J.

IN CHANCERY OF NEW JERSEY.

AFFIDAVIT OF CHARLES A. STERLING.

STATE OF NEW JERSEY s.s.:

Charles A. Sterling, being duly sworn on his oath 40 says, that he is President of the complainant, and

entered into negotiations with defendant with a view to adjust matters in controversy relating to the route to be adopted in constructing a railway across his land; that these negotiations began in May, 1890, and were continued until September 6th, 1890, when a formal meeting was held at deponent's office in New York, when he and his counsel and deponent and the counsel of complainant were present; that
10 after two and one-half hours' conference, no result was reached, Mr. Packard declining to make any proposal at that time, but agreeing to meet deponent at the same place on the following Wednesday, September 10th, and submit a proposition for the adoption of a new route over land, most of which was controlled by him; that Mr. Packard did not attend to keep said appointment or give deponent any explanation of his absence. On Friday, October 12th, deponent saw Mr. Fuller, counsel for defendant
20 and asked an explanation which Mr. Fuller could not give.

Deponent then stated that he should leave town the next day at two P. M. for several days, but Mr. Fuller did not offer to make any more appointments.

That deponent learned that the Council of the City of Bayonne had passed, pending the negotiations and in the month of August, certain ordinances in the interest of Mr. Packard, and on his petition, the passage of which it was agreed between deponent and coun-
30 sel for defendant should be delayed pending the negotiations, and the passage thereof was not made known to deponent by Mr. Packard or his counsel, though the latter was present at the meeting when the same was passed. That deponent also learned that Mr. Packard had continued work on his canal southwest of the right-of-way, contrary to deponent's understanding with his counsel that all action should be delayed pending negotiations. That having ascertained these facts and being satisfied from the
40 failure of defendant to keep his appointment, that the negotiations had failed and defendant was only

asking delay, deponent directed complainant's counsel to prepare to take possession of the right-of-way. That shortly before September 27th, deponent learned that Mr. Packard wished to meet him again, and on Friday, September 28th, deponent directed the counsel for the company to suspend further action until the interview could be held. That on the failure to settle at that interview the negotiations were expressly declared by both parties to have 10 failed and defendant gave orders for possession to be taken with all dispatch.

CHAS. A. STERLING.

Sworn and subscribed at Jersey City, N. J., this 13th day of October, A. D. 1890, before me.

WILLIAM D. EDWARDS,
Master in Chancery
of New Jersey.

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AFFIDAVIT OF FRED. M. SLATER.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.: 30

Fred M. Slater, being duly sworn on his oath, says that on the third day of February last deponent attended on the premises of Ralph G. Packard, in the City of Bayonne, with the commissioners in condemnation mentioned in his previous affidavit in this matter, and that the commissioners found the dredge of Mr. Packard excavating the canal across the right-of-way on that day, and that the canal had not been 40 dug across the entire right-of-way, but was being excavated at that time.

And deponent further says that when he entered

and took possession of the right-of-way on the twenty-ninth day of September last, as set forth in his affidavit, he did so under orders of the president of the company to construct the railroad only upon that portion of the right-of-way which was not included within the limits of East 28th street; that the location of the right-of-way at that point was very difficult, because no streets are actually shown on the
10 ground; and the excavating of the canal has obstructed the view of the streets on the upland.

In order to avoid an encroachment either upon the land of Mr. Packard adjoining on the north, or of the street adjoining on the south, and to drive piles on that part of the right-of-way whereupon he intended to construct his railway, deponent had six assistant engineers with instruments to determine the location of East Twenty-eighth street and by the signals to direct the position of the pile driver in driving piles.
20 That these arrangements were obstructed by the interference of the dredge of Mr. Packard which was placed upon the premises, and the iron bucket of which was let fall upon the pile driver, crushing the roof over the engine and boiler, and endangering the lives of the men employed to drive piles; the pile driver being at that time in the proper position to drive piles on the right-of-way between the street and the land of Mr. Packard.

The pile driver was thereby driven off the right-of-
30 way and the dredge occupied the same. Subsequently an injunction from the Chancellor having been served upon Mr. Josiah Packard, the pile driver was moved back upon the right-of-way as near as possible to the line intended to be occupied and close against the dredge, and piles were driven as nearly as possible on the tract on which it was intended, as above set forth, to construct the railroad. It was about dark when the first piles were driven and the work continued after dark, and deponent finds from subsequent observations since the
40 removal of the dredge, that some of the piles are within the line of the street.

And deponent says that the said piles project about four feet above high water level, and that the established grade of that point of East Twenty-eighth street is between six and seven feet above the same level.

FRED M. SLATER.

Subscribed and sworn to this 9th day of October, A. D., 1890, at Jersey city, before me,

JAS. P. NORTHROP,
Master in Chancery of N. J.

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Answer and Cross Bill, Filed Oct. 13, 1890.

Answer of the defendant, Ralph G. Packard, to the bill of complaint of the Bergen Neck Railway Company.

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This defendant, Ralph G. Packard, for answer to the complainant's bill of complaint, or unto so much thereof as this defendant is advised, it is material or necessary for him to make answer unto, answering says :

1. In regard to paragraph 1 of the bill, defendant admits the organization of the corporation, the filing of the survey and the general route of the rail- 20 road as therein stated, but saith that about some time in the year eighteen hundred and eighty-five the complainant made some show of work on its railroad for about one hundred feet, by laying tracks on the meadow between Twenty-ninth and Thirtieth streets, on the east side of Avenue F, and about five hundred feet from the canal or water-way of the defendant. That work was not upon any of the defendant's land, and has remained in that condition from that time to the present. This is the 30 only work that has been done by the complainant towards the actual construction of its railroad, to the knowledge, information and belief of this defendant, except what was done on the twenty-ninth and the thirtieth days of September, eighteen hundred and ninety, on the propertv of the defendant and intended to fill up and destroy said canal or water-way. There are public acts of the Legislature, under which, in compliance therewith, the time of completion of the railroad may be extended, and this defendant sup- 40 poses that the complainant refers to the same acts in the averment that the time for the construction has

been extended from time to time by the Legislature Whether said general acts have been complied with or not the bill does not allege, and this defendant has no knowledge thereof, and therefore leaves the complainant to make proof thereof as he may be advised ; the defendant, however, insisting that the complainant is entitled to no relief from this Honorable Court based upon an assumption that such compliance has been had. The defendant denies that there are any 10 acts of the Legislature extending the time for the completion of said railroad or any part thereof, except as above stated. The defendant is unable to answer whether the greater portion of the right-of-way has been purchased or acquired by condemnation proceedings or not, as stated in said paragraph, and has no knowledge and cannot answer as to the amount of money which may have been expended by the complainant for such purposes. He therefore leaves the complainant to make such proof thereof as it may be 20 advised.

From information and belief the defendant also saith that the said acts for the extension of the time for completion have not been lawfully complied with and insists that the complainant has now no right to exercise any corporate franchise by reason thereof,

2. As to paragraph number 2 of the bill the defendant admits that the route crosses the salt marsh or meadow as therein stated, and a large tract 30 of which is owned by this defendant, and that of said latter tract the complainant proposed to take by condemnation the parcel therein mentioned. The said marsh or meadow land lies in the heart of the City of Bayonne, extending from New York Bay to the Kill von Kull, and is most advantageously located for the construction of a canal or water-way into the same, and for shipping and commercial uses. 40

In or about the year eighteen hundred and seventy-nine, this defendant conceived and matured a plan for the construction of said canal or water-

way, and shore front improvements, which he has prosecuted from that time to this, and has actually expended in the enterprise about one hundred and fifty thousand dollars. The said enterprise consisted in dredging the channel from the exterior line for piers in New York Bay, to and into the said property owned by this defendant. The said channel at its outer end is about seventy-five feet in width, and
10 gradually increases in width until within twelve hundred feet of the shore, where it reaches a width of one hundred and fifty feet, and from there into and past the alleged right-of-way of said Bergen Neck Railway Company the width is about one hundred and fifty feet. The channel varies from ten to twenty feet in depth at ordinary low water until the inner channel is reached and there a depth of twenty feet of water has been obtained. This defendant has had
20 a long experience in dredging, and has performed a great deal of work in the different basins and waters about the harbor of New York and other cities of a similar character, and that he saw that a canal basin or water-way of this character in the heart of the City of Bayonne would be very remunerative to him and beneficial to said city and the public generally. There has been expended up to January, eighteen hundred and ninety, upon this improvement, about one hundred and fifteen thousand dollars by defendant. Pre-
30 vious to the first of January, eighteen hundred and ninety, defendant commenced dredging in the canal upon the meadows. He had been delayed in that work by reason of his inability to make some purchases to the west, but he had been prosecuting the outer work for several years, which work consisted of bulkheads and piers and the dredging of the channel aforesaid.

The outer channel was dredged as hereinbefore stated by the first of January, eighteen hundred and
40 ninety. The plan contemplated wharves and warehouses and factories along the inner canal and at the

mouth thereof. The defendant owned three hundred and eighty feet of the shore front upon tide-water, and had acquired a lease from the State to fill out, and to build bulkheads, piers and wharves, and make the improvements as authorized by the riparian acts of the State of New Jersey. In the year eighteen hundred and eighty-five, when the certificate of organization of the complainant was filed, this defendant had previously constructed a very considerable part of 10 the bulkheads and outer channel in furtherance of the enterprise. The map annexed to this answer making part thereof, substantially exhibits the scope and nature of the plan of improvement.

In further answer the defendant saith that there were no actual negotiations between the complainant and the defendant for the right-of-way previous, to the appointment of commissioners by Judge Knapp. The defendant was at all times unwilling to sell his land for railroad purposes, and that he has 20 no doubt, was distinctly understood by the company, for such sale was entirely inconsistent with his plan of improvement. The defendant has been willing to make terms with the complainant for a relocation of its route so that the canal or water-way aforesaid may not be destroyed by the railroad, or even impaired in its usefulness by a draw-bridge. At the time of the commencement of the condemnation proceedings the dredging of the meadow was in progress, and at the time of the award made by the com- 30 missioners was completed west of the westerly line of the railroad for a distance of about three hundred and fifty feet. The defendant did not cease working upon the canal by reason of the commencement of the proceedings to condemn, but continued regularly on, as he supposed he had a right to do, he being unwilling to yield to the idea of the complainant that the railroad company could shut up his canal in the construction of its road, and deprive him of the benefit thereof, and of the large expenditure of 40 money previously made by him in carrying

out the plan of the works. He supposed and insists now that if any right exists in the company to cross said canal as proposed, that it can only be with a due regard to his right to use the same as a canal or water-way, or basin, and that the crossing by the company could not interfere with such right, except only incidentally as the enjoyment thereof might be inconvenienced by a bridge over the same. The de-
10 fendant admits that the report of the commissioners was made the thirteenth day of March, eighteen hundred and ninety, and filed in the office of the Clerk of Hudson County, but denies that said report and filing, and the payment of the amount of the verdict of the jury, as set out in the bill, gave the complainant any title or possession to the land in question for the purpose of constructing its railroad, or any other purpose.

20 3. The defendant admits that an appeal was taken by him from the award of the commissioners, and that the same was tried in the Circuit Court of the County of Hudson, and a verdict rendered fixing the value and damages at seventeen thousand dollars. The award of the commissioners gave the complainant no authority to take possession of the land in question by reason of the appeal, neither did the verdict of the jury give any such right. The defendant admits that judgment was entered upon said ver-
30 dict in said Circuit Court on the sixth day of September, eighteen hundred and ninety, but saith that the same was entered by the railroad company, and not by this defendant. The circumstances under which the said judgment was entered this defendant is informed and believes, and so saith, were as follows: Asa W. Dickinson, one of the firm of Dickinson & Thompson, attorneys of the railroad company in the appeal, and who represented the said company in the con-
40 demnation proceedings and in the negotiations hereinafter referred to, stated to Charles W. Fuller, at-

torney and counsel of this defendant in all these proceedings, on the fourth or fifth day of September, eighteen hundred and ninety, that they would be obliged to enter up a judgment on the said verdict before the end of the term of the Hudson Circuit Court in order to save the rights of the parties in said verdict, but that no advantage would thereby be taken, and that the same should not interfere with the negotiations then pending, and which are 10 referred to in one of the affidavits of Charles D. Thompson annexed to the bill of complaint. The said Fuller then told the said Dickinson that without such an understanding he should instantly upon the entry of the judgment take out a writ of error to the Supreme Court, but that if no advantage was to be taken from the fact of the judgment he would not do the same at once, or until after the result of the negotiations were known. To this the said Dickinson assented, and the company, on its own motion, en- 20 tered up the judgment on the sixth day of September as aforesaid, that being the last day of the pending term of the Hudson Circuit Court on which the judge thereof was present. The defendant denies that such entry was actually necessary in order to save the verdict of the railroad company, as there could have been a continuance until the next term, but the counsel of this defendant made no objection to the course proposed under the understanding as herein stated. In fact the said Fuller mentioned 30 such continuance to said Dickinson, but said Dickinson preferred the course that he had suggested, because, as he stated, that Mr. Collins, of counsel for the company, had advised it.

This defendant further saith, that the day after the rendition of the verdict, the company applied to the Court for judgment thereon, but that the Court continued the motion for one week from the succeed- 40 ing Monday, which would be the twelfth of May last, after which the hearing was continued from time to time, and the same lapsed by common con-

sent, or acquiescence, no doubt, by reason of the pending negotiations between the company and this defendant for a settlement, and such was the condition of affairs with reference to said verdict when the conversation was had between said Dickinson and Fuller.

The defendant always intended to take his writ of error to the Supreme Court whenever judgment
10 should be entered upon the verdict, in order that the case might be reviewed therein, a large number of bills of exceptions having been allowed to the defendant by the Court upon the trial. And this defendant verily believes, and is so advised by his counsel, that the verdict and judgment are contrary to the law of the land.

The defendant further saith, that his appeal was promptly taken from the award of the commissioners on the same day of the filing thereof, and that the
20 complainant had acquired no rights previous to, or during the progress of the appeal, or by reason of the verdict, to enter into possession of the premises in question, or any part thereof. Neither did the complainant, by reason of the entry of the judgment thereon, nor the payment of the amount of the verdict into the Court of Chancery, acquire any right to take such possession, or to interfere with the defendant in the enjoyment of his land proposed to be taken by the company.

30 The defendant in further answering saith that during the interval between the rendering of the verdict, and the twenty-seventh day of September, eighteen hundred and ninety, including that day, up to one o'clock in the afternoon, negotiations were in progress between the company and this defendant, for a settlement of all matters in difference between them with reference to the complainant's railroad. That on the day last mentioned, at No. 55 Broadway, in the City of New York, there was a meeting for that
40 purpose between the president of the railway company and the defendant, the appointment having

been made a day or two before by both parties for eleven o'clock of that day. The president of the railway company, Charles A. Sterling, and this defendant met at the hour appointed, and continued in conference to the hour of one o'clock aforesaid, and they then separated without being able to come to an agreement. This defendant, at that time, had no knowledge or suspicion that any proceedings had been taken in the Court of Chancery for the pay- 10 ment of the amount of the verdict into court, or that any order to that effect had been taken on the twenty-sixth day of September, the day before. This defendant, in good faith, met said appointment, and endeavored to come to an agreement with the company, but was unable to do so.

The defendant further saith that a very few days after the passage of certain resolutions, referred to in the bill of complaint, by the Bayonne City Council on the sixth day of May, A. D. eighteen hundred and 20 ninety, negotiations were entered into on behalf of the company and this defendant for a settlement of the matters in difference between them in regard to said railroad, and that it was agreed between Charles W. Fuller, counsel for this defendant, and Charles D. Thompson, attorney and counsel of the company, that, pending such negotiations, and until the same should be terminated, that nothing should be done on the part of the company to interfere with the possession of the premises in question, or to disturb the 30 possession of the defendant therein. These negotiations were had from time to time, and, as this defendant believed, in good faith (it was certainly so on his part), for the purpose of reaching a satisfactory result by which the route of the railroad should be re-located so as to preserve entire the canal or waterway of the defendant, which re-location this defendant always regarded as entirely practicable and just towards himself in view of this enterprise, and for the mutual interest of all parties concerned. Tenta- 40 tive maps were prepared by the railroad company

designating routes for re-location, and which were the subject of discussion pending the negotiations referred to. These negotiations also involved a part of what is called the Kill von Kull Railway, which is located over other property of this defendant reaching the canal. The great object of this defendant has always been to save his canal or water-way from any interference whatever by the complainant, 10 and to be protected in his expenditures already made, and to carry out his plan of improvement. Even a crossing of the canal by the railroad would impair its uses, but to have the same filled up would be of immense damage to this defendant, and therefore the amount of the verdict was a secondary consideration to him in view of the great loss that the construction of the railway across his canal in any mode would create.

In further answering the defendant saith that 20 he has no knowledge, except as stated in the bill, of an application to the Court of Chancery on the twenty-sixth day of September, eighteen hundred and ninety, in pursuance of which it is said in substance that the amount of the verdict, with interest and costs, was ordered paid into the Court of Chancery, and therefore leaves the complainant to make such proof thereof as he may be advised. Defendant, however, saith that such order and payment did not enable or authorize the complainant in any way to 30 take possession of the land in question. The defendant admits that on the trial before the jury it was announced to the Court and jury that it was the intention of the railway company to build an embankment across the canal within the lines of the alleged right-of-way of the railroad, which embankment it was stated by counsel would be not over six feet above high-water mark (meaning ordinary high-water mark), and that the Court permitted the company to have the jury find damages upon that 40 basis. To this ruling the Court allowed this defendant a bill of exceptions, and it is one of the ques-

tions involved in the writ of error hereinafter mentioned.

The defendant further saith that there was nothing in the pleadings making up the issue to be tried before the jury, or in the condemnation proceedings indicating any such claim, and respectfully submits that his rights cannot be taken away by any such arbitrary power as that claimed by the company to determine how the canal shall be crossed. The question, 10 however, is one for careful judicial consideration, and his Honor who presided at the Circuit, as the counsel of the defendant, were satisfied, permitted it to be put in that shape with a view to an ultimate determination by a higher tribunal.

The defendant further saith that no tender to him of the amount of the verdict, interest and cost has been made by the complainant, and denies that there is any authority to pay the same into the Court of Chancery under the facts of this case. The defend- 20 ant submits that the payment of the money into the Court of Chancery as aforesaid, in no way justifies the complainant in attempting to take possession of the land in question or to interfere with the rights of the defendant therein. Whether on the twenty-seventh day of September, A. D. eighteen hundred and ninety, the sum of seventeen thousand dollars with interest and costs, was paid into the Court of Chancery by the complainant, this defendant has no knowledge, except as informed by the complainant 30 under a notice, a copy of which is annexed to the complainant's bill, and which was served on this defendant on the twenty-ninth day of September, eighteen hundred and ninety. It is evident from the information since obtained by the bill of complaint and the affidavit annexed thereto, that while the parties were in negotiation on the twenty-seventh of September, eighteen hundred and ninety, that the company had been taking 40 measures, unbeknown to this defendant, to pay the said money into court, and that it had been paid into court at the time of said negotiations, and that the

company gave no information then thereof to this defendant.

This defendant further saith that immediately upon the service of the notice aforesaid on the twenty-ninth day of September, he communicated with his counsel, Charles W. Fuller, who at once issued a writ of error out of the Supreme Court of the State of New Jersey to the Judge of the Circuit 10 Court of the County of Hudson, which writ of error he had prepared on the ninth day of September, eighteen hundred and ninety, in case it became necessary by a failure of the negotiations to use the same. The said writ of error was duly presented to Honorable Manning M. Knapp, Judge of the Hudson Circuit Court, on the twenty-ninth day of September, eighteen hundred and ninety, and return thereto ordered to be made by the Clerk according to law, which writ of error is still in the hands of the Clerk 20 of the Circuit Court awaiting the making up of the record and the return thereto. This writ of error having been duly issued, the defendant saith and insists stays any action by the complainant based upon the said judgment of the verdict, and prevents the complainant from interfering in any way with the possession or control of the defendant or his canal, or the lands in question.

This defendant relied in good faith upon the arrangement made between the company and 30 himself by their respective attorneys and counsel, in view of the negotiations pending, and of which arrangement he was duly informed and understood, and would have resisted the application for a judgment upon the verdict, and the entry thereof, had he supposed that there was any question of good faith on the other side; or if he had so supposed he would have taken his writ of error at once upon the entry of the judgment; but believing that negotiations were fairly in progress 40 and prosecuted with a desire on the part of the company to reach a settlement, he had not the slightest

suspicion that any advantage whatever would be taken of him.

4. In regard to paragraph 4 of the bill, the defendant admits the location of East 28th Street as therein mentioned, and which street this defendant saith was opened by an ordinance duly passed by the Common Council of the City of Bayonne, and approved by the Mayor March 19, 1873, a copy of which is hereto annexed making part of this answer, 10
and to which reference is made for the particulars thereof. Several years previous to the organization of the Bergen Neck Railway Company there had been laid out by the City of Bayonne certain streets upon the meadow or marsh land as indicated on the map of the complainant annexed to the bill of complaint, by dotted lines, which fact appeared at the trial before the jury in the Hudson Circuit Court of the appeal, and the Court then charged the jury in substance that the existence of those streets across 20
the canal should be considered by the jury, and limit the right of the defendant in the construction or use of his canal or water-way and to damages. For particulars thereof reference is made to the charge as referred to in the bill of complaint. By reason thereof the damages of the defendant must have been largely reduced. To this part of the charge, as well as other rulings, an exception was taken by the defendant, and a bill of exceptions allowed by the Court. By reason of the 30
embarrassment arising out of the charge in the respect aforesaid, and in order to protect, or help protect, the defendant in the enjoyment of his canal or water-way, he applied to the Common Council of the City of Bayonne to vacate certain streets, but not including East 28th street, and for leave to build a bridge. For the full particulars of such application he refers to the same, a copy of which is set out in the affidavit of James Murphy, Jr., annexed to the bill of complaint; but if there are any errors therein 40
prays that the same may be corrected by referring

to such original application. The resolution passed by the Common Council in regard to grading East 28th street and constructing a draw-bridge, is substantially set out in the bill of complaint, but if any errors are therein contained the defendant prays that the same may be corrected so as to correspond with the original resolution. In regard to that part of the petition to vacate streets, the defendant saith that
10 the Common Council, in the fore part of August, eighteen hundred and ninety, vacated parts of the streets as requested in the petition or application, a copy of which ordinance is hereto annexed, and to which reference is made for the particulars thereof. Whether the complainant had notice of the passage of the resolution aforesaid this defendant has no knowledge, but saith that he is aware of no law which requires it.

20 5. In regard to paragraph 5 of the bill the defendant in answering saith that the proposed draw-bridge will extend on a line with East 28th street, but the outer line of the complainant's railway will cross the same diagonally. If there were no draw-bridge there the said center line would cross East 28th street diagonally; and said street was opened by ordinance several years before the railroad company was organized. The land for said street was condemned by the City of Bayonne for said opening and dam-
30 ages therefor by reason of the taking of the land regularly assessed and collected. East 28th street previous to its opening was laid down by the said authorities upon a map made for the city by the map and grade commissioners, and the grade authoritatively fixed thereby before the opening of the street. The grade established by the City of Bayonne for said street is about the height that the railway company proposes to make its embankment as stated before the court and jury, and so that it is
40 intended by the said company to cross East 28th street at grade, which is contrary to law unless with the permission of the Common Council of said city.

No such permission has been given to the complainant by the said Common Council, yet notwithstanding that, the complainant is attempting, contrary to law, to take possession of the land in question of the defendant, and construct its railroad thereon at grade.

This defendant in further answering paragraph 5 of the bill says that he denies that the grades of the complainant's railroad must conform to those 10 of the Central Railroad Company, a short distance to the north, and saith that it is practicable, and within a reasonable expense, to construct the complainant's railway in such a way over said street as not to interfere with the public travel upon the draw-bridge. The defendant also saith that there is nothing in the physical condition of the territory to make it necessary that the complainant should only cross said street at grade. Defendant further saith that he is a civil engineer of long experience, and knows that 20 an overhead crossing can be readily constructed so as to preserve the public travel at the draw-bridge crossing, and at reasonable expense therefor. If an overhead crossing is to be made by the company there should be a draw in that, in order to protect the defendant entirely in the uses of his canal or water-way ; but whatever the grade of crossing of the complainant may be, whether at grade or not, the complainant, this defendant insists, has no right to build an embankment and shut off the canal or water- 30 way for use, and thereby greatly injure this defendant.

In answering paragraph 5 1-2 of the bill, the defendant saith that although the end of East 28th street is in or upon the salt marsh or meadow, and although in its present unimproved condition it may be impassable there for horses, of which this defendant cannot definitely speak, and although there are no open streets within a distance of about a quarter of a mile from the easterly end of said street at 40 the proposed draw-bridge, in an easterly or

southerly direction, yet that, in the City of Bayonne there is no territory better adapted for development commercially, and for the growth of business, than the stretch of land between New York Bay and Kill Von Kull, which the complainant designates as salt marsh. A large part of it is salt marsh or meadow, and the streets were opened by the City of Bayonne with a view to
10 the improvement thereof. By referring to the map annexed to the complainant's bill of complaint, it will be seen that there is a basin, across which the lines of the complainant's railroad on the map run. That basin was constructed up to the line of the railroad by this defendant previous to the condemnation proceedings, and to the northwest thereof, between said basin and the canal or water-way of the defendant, has been constructed by him a bulkhead and wharf along the New York Bay. When East 28th
20 street is improved access to said basin and wharf will be had from East 28th street. Reference is made to the map annexed to the complainant's bill of complaint for the location of East 28th street, Avenue H, and East 27th street, as laid down on said map, and for the location of said basin and the bulkhead and wharf which were constructed by the defendant between said canal or water-way and the basin referred to. The bulkhead and wharf above referred to are three hundred feet in length along New York Bay.
30 The basin aforesaid is intended for the purpose of a dry dock, and is a part of the plan of improvement within the scope of the enterprise. A very large amount of dredging has been done in front of the bulkhead aforesaid previous to the condemnation proceedings, and so that ships of large draught could lie at the wharf. The existence and improvement of East 28tk street are very important in order to gain access to said wharf and basin, as well as a part of the development of the territory in that neighbor-
40 hood. General improvements in Bayonne have so far advanced as to make the speedy development of

this marsh or meadow land of great importance, and to give the requisite facilities for the growing business of that city. It is difficult to understand what upland is indicated by the complainant as now used for farming purposes, but the defendant saith that a very large part of the upland adjoining said meadow or marsh land has been built upon and is used for dwelling and business purposes. The averment in this paragraph of a salt creek is too indefinite for the 10 defendant to answer intelligently, but he admits that there are the remains of a salt creek within the limits stated in the complainant's bill, but not upon the defendant's land, although a boundary in fact, but which creek has been gradually filled up, the mouth of which is indicated on the map annexed to the complainant's bill, and is several hundred feet from said draw-bridge and to the east of the basin aforesaid. The existence of the remains of said creek is no practical impediment to the improve- 20 ment of said meadow land. The defendant further saith that the construction of said draw-bridge would immediately upon its completion serve useful public purposes as a part of the necessary course of improvement in that locality, the development of the territory and the furtherance of the enterprise of this defendant.

6. This defendant in answering paragraph 6 admits that very soon after the rendering of the verdict negotiations were entered into between the 30 complainant and this defendant, with a view to changing the route of the railroad to other land of the defendant and land to be purchased by the defendant for that purpose. These negotiations involved the purchase of other tracts of land by this defendant to the west, which purchases were made by him pending said negotiations at an expense on his part of upwards of twenty thousand dollars for said lands, of which the complainant had full knowledge as this defendant is informed and 40 believes. There was a difference of opinion between

the company and this defendant as to the advantage to the complainant of a change in the route of the railway, the defendant insisting that such change would be beneficial to the company. There was a difference also as to the amount of money to be paid to the defendant by the company in case a re-location of the route of the railroad were made, but each knew about where the point of difference was as to
10 price. While this was so, no definite offer had been made by the company, or by this defendant to the company, up to the twenty-seventh day of September, eighteen hundred and ninety. The negotiations involved the settlement, not only of the right-of-way across the canal by the complainant, but also other tracts and parcels of land which were to be taken for the complainant's road and also the Kill von Kull Railroad, which was a connecting scheme with that of the complainant's road. The defendant further
20 saith that while, up to the twenty-seventh of September, eighteen hundred and ninety, the negotiations had not reached a point where there was a definite offer on either side, yet they were progressing in such a way as to induce the defendant to believe that they would result in a settlement.

The defendant admits that in the month of August last he renewed the excavation or dredging of his canal south of the complainant's line of railway, but in his own territory, which dredging was done at his
30 own risk and for the sake of advancing the work, but in no way interfered with the land within the lines of the complainant's railway. Such excavation was at the point where East 25th street on the map aforesaid if projected would strike the canal or water-way on the northwest side of the canal. Defendent, pending the negotiations, agreed to do no work in the canal within the lines of the complainant's survey, which agreement he faithfully observed ; but at the time of the verdict he was engaged in dredging in said canal
40 to the west of said lines, and so continued from time to time afterwards up to within a few days. The

special excavation referred to in paragraph 6, in the month of August, was for the building of a bulkhead for which the material had been purchased in part by this defendant at a considerable expense. The course of the negotiations was such, apparently to this defendant, as to induce the belief that a settlement would be made by which his canal would not be interfered with, and besides he could not believe that the company could lawfully cross the canal as 10 located without a draw to permit the defendant to have the use of his canal or water-way. Some work has been done by the defendant towards the grading of East 28th street to the west of the canal, between the canal and Avenue F, which work was done very soon after permission to grade was given to the defendant by the City of Bayonne. No work has been done as yet in the actual construction of the draw-bridge. The defendant denies that the complainant desires to construct its railroad subject 20 to the proper rights of the public in said street, and saith that the complainant is disregarding any rights of the public therein, and is attempting to fill up the defendant's canal or water-way and to destroy the use of said street by the public, and to so construct its railroad as that the public will obtain no benefit from the said street. The defendant has a contract with the City of Bayonne to build said drawbridge, and it was made about the time of the passage of the resolution aforesaid, but afterwards. The defend- 30 ant, however, had no intention of building said drawbridge during the pendency of said negotiations, and has not threatened to interfere with the rights of the complainant by the building of said draw-bridge, although as soon as his rights are settled he proposes to build said draw-bridge, unless an arrangement should be made between the City of Bayonne and the parties interested, or this Honorable Court should decree to the contrary or a different plan of crossing the canal be agreed upon or ordered, which would 40 save the use of said canal to this defendant. The

defendant admits and saith that the construction of a railroad, as contemplated by the complainant, will be a complete obstruction to the canal and also of the street. The defendant denies that the complainant has paid for the privilege of destroying the canal, or that the construction of a draw-bridge according to the resolution, would be idle and useless except as an obstruction to the complainant.
10 As to where the draw-bridge will terminate it is perfectly plain from the lay of the land and its character, and in further answering in that repect, the defendant refers to the map annexed to the bill of complaint. Avenue H, on said map, extends to the termination of East 28th street, and the two streets connect.

The defendant denies that the resolutions hereinbefore referred to were applied for and passed, with intent to interfere with any lawful rights of the com-
20 plainant to construct its road, and to deprive it of any property which, by the verdict of the jury, complainant had been placed under a fixed liability to pay for. This defendant was not seeking the benefit of the verdict, and judgment was obtained thereon on the motion of the company.

The defendant also denies that the complainant had acquired title to the land in question back to the thirteenth day of March last, or any other time. He also denies that the resolutions were unauthorized
30 by the charter of the City of Bayonne, or that they were unreasonable, unlawful and void. He also denies that the permission to grade, under the charter of the City of Bayonne, and supplements, was required to be by ordinance, but was properly given by resolution. And he also saith that the authority to construct a bridge was within the power of said charter and supplements, to all which he makes reference. The Revised Charter of the City of Bayonne was approved March 22, 1872, and the supple-
40 ments and amendments are under acts approved March 28, 1873, March 27, 1874, and March 24, 1875.

And this defendant by way of cross-bill exhibited against the complainant, says:

That at the point of crossing the canal or water-way of this defendant by the route of the complainant, the depth of the water in the canal is, and has been since the construction of said canal there, twenty feet at ordinary low water, said water being tide-water coming in from New York Bay, and the width one hundred and fifty feet. The said canal or 10 water-way is, as stated, a part of the plan of improvement for the commercial and business purposes as hereinbefore mentioned. The complainant in the construction of its railroad has no right to cross said canal so as to destroy the same. The said canal is an essential part of the enterprise hereinbefore referred to. If the complainant has a right to cross the same, it can only be in such a way as to impair the use of the canal to the defendant as little as possible, and for which compensation should be given. 20 Such crossing can only be with a draw-bridge. It is entirely practicable to make such draw-bridge, whether the complainant crosses at grade, or above grade. If the complainant crosses at grade, it is entirely practicable to do so upon a draw-bridge, which may be used in connection with the public upon East 28th street. The complainant could cross said canal above grade at a sufficient height to preserve the uses of the canal or water-way for tugs, barges, and other craft, except masted vessels ; 30 but the defendant says there is no reason why the complainant should not construct its crossing with a draw. The defendant insists that the complainant has no right to invade his property in said canal by condemnation further than is actually necessary to make said crossing, if said right of condemnation exists in the complainant. All other facts in this answer hereinbefore stated, are made part of this cross-bill instead of repeating the same.

In addition thereto this defendant saith that the 40 complainant, intending to deprive this defendant of

the right to retain possession of the land in question, about noon of the twenty-ninth day of September, eighteen hundred and ninety, proceeded with a large force of boats and men through the canal or waterway of this defendant from the exterior line of solid filling in New York Bay, to the property within the lines of the route of the complainant's railway, and by force attempted to remove from said canal a
10 dredge and some scows of this defendant, and to injure his property. This effort was accompanied by great violence of action and threats to do bodily harm to those in the employ of this defendant. The defendant insists that he has a right to retain possession of the premises in question until the determination of the writ of error hereinbefore referred to, and until the question of the right and mode of crossing shall have been definitely settled by this Honorable Court, and in the highest Court of the
20 State if necessary, and just compensation paid to this defendant.

This defendant also saith that the complainant on the thirtieth day of September, eighteen hundred and ninety, further proceeded to take possession of that part of the canal of this defendant within the lines of the route of the complainant's railway, and did actually drive thirteen piles at least into the bed of said canal at the point aforesaid, with the intention of entirely
30 obstructing the use thereof, and building its railway across said canal by embankment, thus completely shutting off access from New York Bay through said canal to the west of the lines of the complainant's railroad. This action was accompanied also with great violence and noise and a very large number of workmen, the object being clearly on the part of the complainant to take speedy and immediate possession of the lands in question. On Monday night of the twenty-ninth of
40 September last, the complainant also had a large number of Italians at work shovelling dirt into said

canal within the lines of said railroad and East 28th street, but ceased for the time being by reason of the order of this Honorable Court made in thls cause to preserve the existing status.

This defendant also saith that he is informed and believes, and so saith that a considerable part of his canal or water-way is the bed of an ancient navigable creek, or tide-water channel, between New York Bay and the Kill von Kull, in the County of 10 Hudson, State of New Jersey, and that at the point of crossing as proposed by the complainant within the lines of the canal or water-way as excavated by the defendant said ancient creek ran.

He also saith that the canal or water-way as projected by him and thus far constructed is now a part of the navigable tide-water of New York Bay.

He further saith that on the thirteenth day of March, eighteen hundred and ninety, the date of the 20 award by the commissioners, the said canal or water-way was also then a part of said navigable tide-water and extending to the west of the westerly line of the complainant railway location.

The defendant also saith that it is unconstitutional and contrary to the laws of the land, for the complainant, for the purpose of its railroad, to interfere with the rights of property of this defendant any further than absolutely necessary therefor, and that the complainant cannot claim any other right to take 30 the property of the defendant than for a crossing of said canal or water-way at the point thereof, which crossing can only be with a draw-bridge so as to preserve to this defendant the uses of said canal or water-way for the purposes intended. The said canal or water-way is a necessary part of the enterprise in this answer described, and the substantial object of the construction of the bulkheads, piers, wharves and channels outside of ordinary high water mark as projected and constructed by this defendant 40 will be destroyed, and the expenditures already

made by this defendant therefor be rendered almost, if not entirely, useless. The attempt to cross said canal or water-way by an embankment, or in any other mode, so as to shut up the same by the complainant, is a reckless destruction of the defendant's property which is not founded in necessity within the scope of the complainant's powers, and is in total disregard of this
10 defendant's enterprise and the improvements already made. Notwithstanding this, the complainant is endeavoring, under color of the condemnation proceedings hereinbefore referred to, to take possession of the premises in question and deprive this defendant of the entire use thereof, not only at the point of crossing, but to destroy his improvements as aforesaid.

This defendant also saith that the condemnation proceedings referred to do not, in any way, indicate
20 on their face the mode of crossing the canal or water-way of the defendant. Said proceedings described the premises in question as land merely, making no reference to the canal or water-way. Neither is there anything in the issue as made up on the appeal aforesaid which shows the mode of crossing or mentions the canal or water-way; but on the trial of the appeal aforesaid, the complainant was permitted to state to the Court and jury that it was intended to cross the said canal or water-
30 way upon an embankment or trestle at an elevation of six feet above high water, and the Court in the following language submitted to the jury the question of damage with reference thereto, as follows: "According to my view counsel may go to the jury on the question of damages to be sustained by taking this property, and crossing the track on an embankment or trestle-work not over six feet above high water, and that the railroad company will not be bound to build a bridge or to build a trestle-work,
40 but will have the right to cross it in the way that they indicate." This ruling was objected to by

the defendant, and an exception thereon was allowed by the Court. Previous to this the counsel of the defendant asked the Court to permit the jury to consider the question of damages in view of a crossing with a drawbridge at the canal or water-way. This was denied by the Court, and the question of damage was left to the jury on the assumption of allowing the complainant to elect the mode of crossing, which crossing 10 the counsel of the complainant stated would be by an embankment or a trestle, so as to entirely obstruct the use of the canal or water-way at the crossing. The ruling of the Court was based upon the idea that the company on the appeal might indicate the mode of crossing that it intended, and have the damages assessed accordingly, and if the crossing was to be any different from that, that the matter would have to be dealt with in some other way. This ruling was objected to by the defendant, and 20 an exception allowed thereon by the Court. This defendant insists that it was never intended by the Legislature to allowthecomplainant to determine, according to its own notions, whether such an enterprise, as stated herein should be destroyed, and if such intention exists the same is unconstitutional and contrary to law and equity.

The verdict upon the appeal is only a finding by the jury of damages based upon the assumption of a claim by the complainant to entirely obstruct said 30 canal or water-way by embankment or trestle of the height aforesaid, and does not affect the rights of this defendant, if such assumption is unconstitutional, unlawful and contrary to equity. Such verdict does not prevent the assertion in this Honorable Court of the right of this defendant to be protected in the enjoyment of his property against any invasion thereof by the complainant otherwise than for a necessary crossing of the said canal or water-way with a drawbridge, or in such mode as will preserve to this de- 40 fendant the uses thereof and the benefit of his enter-

prise aforesaid in its full scope. If no writ of error had been taken by this defendant to remove the judgment entered upon the verdict as hereinbefore stated, such verdict and judgment could have no operation in this Honorable Court beyond the limitations upon the complainant to interfere with defendant's rights as already stated, and the defendant saith that the company has no right to use the same to
10 deprive him of any further right of property than is necessary for the crossing with a draw-bridge or other mode which shall preserve the use of the canal or water-way to this defendant as aforesaid. Defendant further saith that said verdict and judgment are subject to the control and restraint of this Honorable Court so as to protect this defendant in his rights as herein claimed, and that the complainant should be restrained from using the same as a means to deprive this defendant of his right to use said
20 canal or water-way as intended by him, and as herein stated.

This defendant further saith that the complainant has not obtained from the Common Council of the City of Bayonne, or the proper authorities thereof, any permission to construct its railroad at the point in question across East 28th street at grade, or in any other way, and that it is in no position as yet, even if the rights of this defendant in themselves do not prevent it, to cross said canal or water-way at
30 the grade upon which said verdict was estimated, to wit, six feet above ordinary high water mark, for such grade is coincident with the grade of East 28th street as established by the city authorities. Under the law the railroad of the complainant can only be constructed above or below the grade of said street (if lawful to construct it at all) and at such distance as shall not interfere with the free and uninterrupted use of such street in the absence of any permission to cross at grade from the Common Council of the
40 City of Bayonne, which permission has never been obtained.

This defendant further saith that the substantial use of his canal or water-way aforesaid at the point of crossing is in no practical sense inconsistent with a lawful crossing by the complainant's railroad, and which, as stated, may be made with a draw-bridge, and that on the question of mutual use at the point of crossing, this Honorable Court should determine and control the same, and the question of just compensation to 10 this defendant in that respect should be ascertained and determined in such mode as this Honorable Court should direct, and the same be made previous to any interference with the rights of the defendant in and to the premises in controversy, but apart from that the writ of error issued as aforesaid by this defendant stays any action based upon said verdict and judgment, and prevents the company from asserting any right to cross by reason thereof as this defendant respectfully saith. 20

This defendant further saith, that the payment of the amount of the award into the Court of Chancery as hereinbefore referred to, was made without the knowledge of this defendant, and without any notice previous thereto, and he denies the right of the complainant to make the same. No tender of the amount of said verdict has been made to this defendant, and since the rendering of the same this defendant has not sought in any way the benefit thereof.

This defendant prays that the complainant may be 30 enjoined and restrained by this Honorable Court from entering into or taking possession of the lands and premises in question, and described in the bill of complainant, or in any way occupying the same, or interfering with this defendant in the use and enjoyment thereof pending the said writ of error, and also from crossing the canal or water-way aforesaid of this defendant at any time otherwise than with a draw-bridge of lawful height and construction, and constructed in such a way as will not interfere with 40 the uses of said canal or water-way by this defendant,

and also for crossing the same by an embankment or trestle constructed so as to destroy the use of said canal or water-way to this defendant as hereinbefore stated to be intended, and from filling up or so impeding said canal or water-way as to prevent the free use thereof by this defendant in furtherance of the purpose and enterprise of which the same is a part, and of taking possession of the premises in
10 question, or occupying the same until just compensation is lawfully ascertained and made, and paid to this defendant under the decree of this Honorable Court, and that this Honorable Court will decree that the canal or water-way aforesaid shall not be crossed by the complainant except by a draw-bridge as aforesaid, and constructed as aforesaid, and then only upon just compensation to this defendant, to be ascertained in such manner as this Honorable Court shall direct and first paid by
20 the complainant, and that this defendant may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

CHARLES W. FULLER,
Solicitor, and
JOSEPH D. BEDLE,
of Counsel of
RALPH G. PACKARD,
Defendant.

30

AFFIDAVITS

STATE OF NEW JERSEY, }
HUDSON COUNTY. } ss.:

40 Ralph G. Packard, of Morristown, State of New Jersey, being duly sworn on his oath, saith that he is

Map showing improvements in the City of Bayonne, N.J.
under construction by R.G. Packard, Esq.
Emmett Smith City Surveyor.
October, 1890.
CANAL
NEW YORK BAY
TO BE DREDGED 20 FEET DEEP.
TO BE DREDGED 26 FEET DEEP.
BASIN
SOLID FILLING
EXTERIOR LINE FOR PIERS
Scale 200 feet to one inch.
SMITH & WESTON,
Civil Engineers & Surveyors,
BAYONNE CITY, N.J.
RAILWAY
MAIN LINE
BERGEN NECK RAILWAY
KILL VON KULL AVENUE
NEW AVENUE
AVENUE
MECHANIC ST.
E. 30TH ST.
E. 29TH
E. 28TH
E. 27TH ST.
E. 26TH ST.
E. 25TH ST.
E. 24TH ST.
E. 23RD ST.

the defendant named in the bill of complaint of the Bergen Neck Railway Company, filed against him in the Court of Chancery of this State, and has read the answer thereto (including that part as a cross-bill) hereto annexed; that the facts, matters and things stated therein, so far as they relate to his own acts and deeds, plans, conversations and intentions are true, and so far as they relate to the acts and deeds of others he believes them to be true. He further saith that all the matters and things therein contained are true of his own knowledge except as to those stated on information or belief in terms, or evidently so stated from the character of the statement thereof, and as to those matters and things he believes them to be true to the best of his knowledge, information and belief.

R. G. PACKARD.

Sworn and subscribed before me, this 10th day of October, 1890.

THOS. F. BEDLE,
Notary Public of N. J.

STATE OF NEW JERSEY, HUDSON COUNTY. } ss.:

Charles W. Fuller, of the City of Bayonne, State of New Jersey, being duly sworn on his oath, saith that he has read the answer of Ralph G. Packard to the bill of complainant of the Bergen Neck Railway Company, including that part making a cross-bill, which answer is hereto annexed; that he was and is the attorney and counsel of Ralph G. Packard as stated in said answer, and that all the matters and things therein contained, so far as they relate to himself, or as attorney or counsel of Ralph G. Packard, or relate to any conversation, arrangement, negotiation or business in which he in any way took a part as mentioned in said answer, are true. He further saith more particularly that all the statements in

said answer as to the writ of error, and as to the negotiations, and agreement to preserve the status pending said negotiations, and as to the charge of the Court on the trial of the appeal, and the rulings and other proceedings upon the trial, and with reference to the verdict and the judgment thereon, and the agreement with reference to the entering up of said judgment, and with reference to the condemna-
10 tion proceedings and their character, and the record of the appeal, are all true.

CHARLES W. FULLER.

Sworn and subscribed before me, this 10th day of October, A. D. 1890.

THOS. B. BEDLE,
Notary Public of N. J.

STATE OF NEW JERSEY,
20 HUDSON COUNTY, } ss.:

Emmett Smith, of full age, being duly sworn according to law upon his oath, saith that he is the City Surveyor of Bayonne, and has resided in said city for upwards of twenty years, during the greater portion of which time he has been the City Surveyor of said city, and is familiar with the grades of the streets of said city established therein; that the grade of the center line of East 28th street, formerly 33d street, at the center of Avenue F, is eight and
30 five-tenths feet above high water mark, and at a point where the line of the Bergen Neck Railway Company intersects the center line of said street, and the Packard canal is six 34-100 feet above high water mark, and at the center line of Avenue G is six feet above high water mark as defined and laid down on the map made by the Map and Grade Commissioners of said City of Bayonne, and that said grade was established over ten years ago by the said Map and Grade Commissioners, as provided by an
40 Act of the Legislature entitled, "An act authorizing the appointment of commissioners to lay out and

map streets, avenues and squares in that part of Bergen Township south of the Morris Canal in Hudson County," approved March 16th, 1857, and the supplements thereto.

EMMETT SMITH.

Sworn and subscribed before me, this thirteenth day of October, A. D. 1890.

THOS. F. BEDLE,
Notary Public of N. J.

10

STATE OF NEW JERSEY, COUNTY OF HUDSON. } ss.:

Alexander R. McKinnon, being duly sworn according to law upon his oath, says that I am employed as a captain of Dredge No. 7, owned by Ralph G. Packard; that on September 29, 1890, at about 10:30 A. M., while I was preparing to go to work with said dredge, 1 hauled back to Scow No. 8, which is in the channel at the City of Bayonne, New Jersey, and was getting anchor lines out, when three tug-boats, named respectively, the Hortense, Petrolia, and Communipaw, one pile-driver, one raft of piles and a scow of dock timber came into the channel from the New York Bay; when they came in I asked the captain of the Hortense where he was going to, but he made no reply; I then asked the captain of the Petrolia the same question, who for answer pointed to one Slater, who asked for the captain of the dredge, and I told him that I was the captain, and then he said, "I want that dredge moved out of there, as I want to get in about where you (deponent) are lying." I asked him whether or not he had an order from the Atlantic Dredging Company or Mr. Packard, whereupon he replied that he did not, but that he had an order from the Court, which order or pretended order he threw to me; it struck the boat, but the wind blew it overboard; he did not make known the contents of the

20 30 40

order to me; I was on a small boat during this conversation, and then went on board of the dredge aforesaid, and while at dinner, and about twelve o'clock, the lines securing the said scow were cut and thrown off, when a tug put on a hawser, which parted; then a second was made fast, which I cut; and others were put on, but were also cut, but we were finally compelled
10 to cease cutting the hawsers as the crews of the tugboats played streams of water upon us, drenching us through and through. I then got a one and one-quarter inch wire rope or cable and passed it around the bitts of the scow and secured both ends back on the dredge; three men came on board said scow No. 8 and cut the wire rope aforesaid, hauled her out and set her adrift; that the scow was not fastened to the property condemned by the Bergen Neck Railway Company, but to the property of Ralph G. Packard;
20 that after pulling out the said scow they brought up the pile-driver; they then hooked on to the spur boom and attempted to tear it off; they crowded the pile-driver past said dredge up against the bucket boom; they then loosened scow No. 5 from its moorings and pushed her ahead up stream past the point where the piles were afterwards driven, letting her go adrift; they then went ashore and cut both of my anchor lines of three-quarter inch steel wire rope or cable; all this time the bucket lay on the canal bank
30 when one of the men from the pile-driver (as I afterwards learned), unshackled one of my hoisting wires so that I had no control of either boom or bucket, and that I, not knowing at that time that the rope or cable had been unshackled, attempted to hoist the bucket, when the end of the wire rope or cable flew in on deck, breaking capstan and endangering the lives of the crew. I finally raised the bucket, which was filled with mud, but was unable to control the said bucket and was compelled to let go of it and it
40 came down on the pile-driver. All this time the water was kept playing upon us, and at one time

they knocked me down with one of the streams. Nothing more was done that day, but on the following day I attempted to haul back, but was prevented from doing so for about one and one-half hour, owing to the fact that the tug-boat Communipaw lay at the stern of said dredge and refused to move until her captain should receive orders. to do so either from Mr. Slater or Mr. Hand.

ALEX. R. McKINNON. 10

Sworn and subscribed before me, this 3d day of October, A. D. 1890, at the City of Bayonne,
JOHN H. PALMER,
Notary Public
of New Jersey.

STATE OF NEW JERSEY, } ss.: 20
COUNTY OF HUDSON.

AUGUST PETERSON, being duly sworn upon his oath, says that he is the mate of the Dredge No. 7, in the employ of R. G. Packard, and on the morning of September 29th last past, and in the course of such emploment, he was on said dredge, and was preparing for work when three tugs, a pile-driver, a raft of piles and a scow of dock timber came into the channel from the New York Bay and ordered us to withdraw from our position, notwithstanding that 30 scow No. 8 was not fast to the property condemned by the Bergen Neck Railway Company, but to property belonging to R. G. Packard, when a tug put a hawser upon said scow which parted ; then a second was secured to her and was cut, whereupon the tugs aforesaid turned their pipes upon us and we were drenched and finally driven to cover ; that the wire cable with which we secured said scow to said dredge was cut by the tug-boat crews, and they also unshackled the hoisting cable attached to the bucket ; that said tug- 40 boats loosened scow No. 5 from her moorings ; that

they set both of said scows adrift; the scow first aforesaid was finally gotten out into the stream after much violence had been used.

AUGUST PETERSON.

Sworn and subscribed before me, this 3d day of October, A. D. 1890, at Bayonne City.

JOHN H. PALMER,
Notary Public of N. J.

10

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

Daniel MacKenzie, being duly sworn according to law upon his oath, says that he is employed by R. G. Packard; on the 29th day of September last past, in the course of such employment, he was on the scow known as scow No. 5, which was anchored in 20 the channel being constructed by Mr. Packard in the City of Bayonne; that he was present when the tugs Hortense, Petrolia and Communipaw came into said channel from the New York Bay in company with a pile-driver, a raft of piles and a scow of dock timber; that the crews of the said tug-boats fastened hawsers to the scow known as scow No. 8 and attempted to pull her out into the stream and when the crew of said scow and of the dredge No. 7 tried to prevent 30 them from doing so, they played three or four streams of water upon them, drenching them with water; the said crews belonging to said tug-boats cut the steel wire rope or cable which was passed over and around the bitts of said scow No. 8 and dredge No. 7 aforesaid, and finally owing to the great violence of the streams of water aforesaid they were compelled to seek cover, when the tug-boat crews succeeded in forcing said scow into the stream, which, together with the scow No. 5, they set adrift. 40 That the mate, August Peterson, was out on the spur boom and the person in charge of the pile-driver gave the engineer directions to hoist the said spur boom

immediately on the chain being connected therewith, well knowing that had such boom been raised the said Peterson would have been killed or seriously injured. I also saw the crews of said tug-boats cut the anchor lines, which moored the dredge No. 7. I also know that neither of said scows were moored to or on the property condemned by the Bergen Neck Railway Company, but to and on property belonging to Ralph G. Packard. 10

DANIEL McKENZIE.

Sworn and subscribed before me, this 3d day of October, A. D. 1890, at Bayonne City.
JOHN H. PALMER,
Notary Public of N. J.

STATE OF NEW JERSEY, COUNTY OF HUDSON. } ss.: 20

Ernest Olson, being duly sworn according to law upon his oath, saith that he is employed by R. G. Packard, and on the morning of the 29th September last past, in the course of such employment, he was on the dredge known as Dredge No. 7, which was moored in the channel being deepened by Mr. Packard in the City of Bayonne; at about eleven or quarter-past eleven o'clock he saw three tug-boats, a pile-driver and a lighter which had come into the channel 30 from the New York Bay upon the property of said R. G. Packard; that a scow known as Scow No. 8 was moored to a dock on the property of said R. G. Packard; that parties from these boats went on the dock aforesaid and cast off the lines of the said scow and from one of the said tugs put a hawser on the scow, and did remove said scow from said moorings despite the repeated protests of the captain thereof, that upon the captain of the scow attempting to cast off from said scow the hawser of the tug-boat, they, 40 turned upon said captain and his crew three or four

streams of water from hose on board said tugs, thoroughly drenching them; that parties from these boats went upon the shore, and with a sharp instrument did cut all the lines which made the said dredge fast to its moorings; that the pile-driver aforesaid was then forced past the dredge with the aid of two tug-boats, the employees of the said Packard being all the time subjected to a thorough drenching from 10 the hose aforesaid from one or more of the tug-boats; that a lot of timber was set adrift by these parties, and one or more scows were shoved into the channel one hundred feet or more beyond the lines of the Bergen Neck Railway Company.

ERNEST OLSON.

Sworn and subscribed before me, at Bayonne City, this 30th day of October, A. D. 1890.

JOHN H. PALMER,
Notary Public of N. J.

20

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } SS.:

William U. Pelletreau, being duly sworn according to law, upon his oath, saith that he is employed by G. Packard, and on the morning of the 29th of September last, in the course of such employment, he was on the dredge known as Dredge No. 7, which 30 was anchored in the channel being constructed by Mr. Packard in the City of Bayonne; at about eleven o'clock three tug-boats, a pile-driver and a raft of piles and a scow of dock timber came in from New York Bay through the channel to where we were working; that said tugs and pile-driver, to the best of deponent's knowledge and belief, were there at the instance of the Bergen Neck Railway Company; that a scow, known as scow No. 8, was moored to a dock on the property of said R. G. Packard; that 40 parties from these boats went on the dock aforesaid and cast off the lines of said scow, and also cut the

steel rope or cable which had been passed over and around the bitts of the said scow and dredge aforesaid, and did remove the said scow from its moorings despite the repeated protests of the captain thereof; that upon the captain of the scow attempting to cast off from said scow the hawser of the tugboat, one of the said boats by the name of Petrolia turned three streams of water upon the said captain and his crew from several hose on board said 10 tug, thoroughly drenching them; that parties from these boats went upon the shore and with a sharp instrument did cut all the lines which made the said dredge fast to its moorings; that the piledriver aforesaid was then forced past the dredge with the aid of two boats, the employees of said Packard being all the time subjected to a thorough drenching from the hose aforesaid; that a lot of timber was set adrift by these parties, and one or more scows were shoved into the channel one hundred 20 feet or more beyond the line of the Bergen Neck Railway Company as understood by this deponent.

WILLIAM U. PELLETREAU.

Sworn and subscribed before me, at the City of Bayonne, this 3d day of October, A. D. 1890.

JOHN H. PALMER,
Notary Public of N. J.

30

CITY CLERK'S OFFICE,
BAYONNE, Oct. 2, 1890.

This is to certify that I have examined the Book of Minutes of the Council of the City of Bayonne, from July 1st, 1885, to the date hereof, and do not find contained therein any resolution granting permission to the Bergen Neck Railroad to cross the streets or avenues of said city at grade.

W. C. HAMILTON,
City Clerk. 40

[L. S.]
[Seal of City of Bayonne.]

STATE OF NEW JERSEY, }
HUDSON COUNTY. } ss.:

W. C. Hamilton, being duly sworn according to law upon his oath, saith that he is the City Clerk of the City of Bayonne, and has the custody of the records thereof; that he has made a careful examination of the Book of Minutes of the Council of said city from July 1st, 1885, to October 2nd, 1890, 10 and that he can find no resolution or ordinance granting permission to the Bergen Neck Railway Company to cross any of the streets of said city at grade.

W. C. HAMILTON.

Sworn to and subscribed }
before me, this 11th day }
of October, A. D. 1890. }

R. CADMUS COMBES,
20 Commissioner of Deeds.

An ordinance to open Thirty-third street from the line of Avenue G to the line of Avenue A.

30 The Mayor and Council of the City of Bayonne do ordain as follows:

Sec. 1. That Thirty-third street from the line of Avenue G to the line of Avenue A, be opened as the same is laid down upon a map made by the Map and Grade Commissioners of said city, and filed in the office of the Clerk of the City of Bayonne.

40 Sec. 2. That the actual net cost of said improvement, after the completion thereof, shall be as-

sessed and paid as directed by the Revised City Charter.

Passed March 18, 1873.

Approved March 19, 1873.

HENRY MEIGS,
Mayor.

Attest:

W. C. Hamilton,
City Clerk. 10

An ordinance to open Thirty-fourth street from the line of Newark Bay to the line of New York Bay.

The Mayor and Council of the City of Bayonne do ordain as follows: 20

Sec. 1. That Thirty-fourth street from the line of Newark Bay to the line of New York Bay, be opened as the same is laid down upon a map made by the Map and Grade Commissioners of said city, and filed in the office of the Clerk of the City of Bayonne.

Sec. 2. That the actual net cost of said improvement, after the completion thereof, shall be assessed and paid as directed by the Revised City Charter. 30

Passed March 18, 1873.

Approved March 19, 1873.

HENRY MEIGS,
Mayor.

Attest:

W. C. Hamilton,
City Clerk.

40

An ordinance to open Chestnut avenue from the line of Avenue E to the line of Newark Bay.

The Mayor and Council of the City of Bayonne do ordain as follows:

Sec. 1. That Chestnut avenue from the line of Avenue E to the line of Newark Bay, be opened as the same is laid down upon a map made by the Map 10 and Grade Commissioners of said city, and filed in the office of the Clerk of the City of Bayonne.

Sec. 2. That the actual net cost of said improvement after the completion thereof, shall be assessed and paid as directed by the Revised City Charter.

Passed March 18, 1873.

Approved March 19, 1873.

HENRY MEIGS,
Mayor.

20 Attest:
W. C. Hamilton,
City Clerk.

An ordinance to change the names of certain 30 streets, avenues and public places in the City of Bayonne.

The Mayor and Council of the City of Bayonne do ordain as follows:

Sec. 1. That the names of the following streets, avenues and public places be changed as follows:

Latourette street to Sixth street.
South street to Seventh street.
Fifteenth street to Linden street.
Sixteenth street to Eighth street.
40 Humphreys street to Ninth street.
Meigs and Elm streets to Tenth street.

Eighteenth and Robin streets to Eleventh street.
Van Buskirk avenue to Twelfth street.
Nineteenth street to Thirteenth street.
Twentieth street to Fourteenth street.
Twenty-first street to Fifteenth street.
Twenty-second street to Sixteenth street.
Twenty-third street to Seventeenth street.
Twenty-fourth street to Eighteenth street.
Twenty-fifth street to Nineteenth street. 10
Summit street to Twentieth street.
Twenty-sixth street to Twenty-first street.
Twenty-seventh street to Twenty-second street.
Twenty-eighth street to Twenty-third street.
Twenty-ninth street to Twenty-fourth street.
Thirtieth street to Twenty-fifth street.
Thirty-first street to Twenty-sixth street.
Thirty-second street to Twenty-seventh street.
Thirty-third street to Twenty-eighth street.
Thirty-fourth street to Twenty-ninth street. 20
Chestnut avenue to Thirtieth street.
Maple avenue to Thirty-first street.
Oakland avenue to Thirty-second street.
Bayonne avenue to Thirty-third street.
Huron avenue to Thirty-fourth street.
Division street to Thirty-fifth street.
South View avenue to Forty-first street.
Sea View avenue to Forty-second street.
Fair View avenue to Forty-third street.
Cadmus avenue to Forty-fourth street. 30
Bay View avenue to Forty-fifth street.
West View avenue to Forty-sixth street.
North View avenue to Forty-seventh street.
Forty-first street to Forty-eighth street.
Forty-second street to Forty-ninth street.
Forty-third street to Fiftieth street.
Forty-fourth street to Fifty-first street.
Forty-fifth street to Fifty-second street.
Forty-sixth street to Fifty-third street.
Forty-seventh street to Fifty-fourth street. 40
Forty-eighth street to Fifty-fifth street.

Forty-ninth street to Fifty-sixth street.
Fiftieth street to Fifty-seventh street.
Fifty-first street to Fifty-eighth street.
Fifty-second street to Fifty-ninth street.
Fifty-third street to Sixtieth street.
Fifty-fourth street to Sixty-first street.
Fifty-fifth street to Sixty-second street.
Fifty-sixth street to Sixty-third street.
10 Avenue B, south of South street to Meigs avenue.
Avenue O to Rathbun avenue.
Avenue P to Humphreys avenue.
Avenue Q to Newman avenue.
Avenue R to Avenue C.
Avenue G to Avenue D.
Avenue F to Lord avenue.
Avenue U to Lexington avenue.
Avenue V to Hobart avenue.
Avenue W to Clinton avenue.
20 Brighton street to Brighton avenue.
East street to East avenue.
Crescent avenue to Avenue E.

Those parts of the streets lying east of Avenue D to be designated East, and those parts lying west of Avenue D, to be designated West.

Passed January 3rd, 1888.

Approved January 6th, 1888.

JNO. NEWMAN,
Mayor.

30 Attest:

W. C. HAMILTON,
City Clerk.

An ordinance to change the location of Avenue G from East Twenty-third street northwardly and to vacate portions of East Twenty-fourth, East Twenty-
40 fifth, New, East Twenty-sixth, East Twenty-seventh, and East Twenty-ninth streets.

The Mayor and Council of the City of Bayonne do ordain as follows :

Section 1. That avenue G, as laid on the Map and Grade Commissioners' Map, from East 23d street northwardly, be changed in location in manner following : The center line to be two hundred and seventy feet eastwardly from and parallel with the center line of Avenue F, to be seventy feet in width and to extend from East 23d street northwardly to New York Bay. 10

Section 2. That East 24th street be vacated between the easternmost line of Avenue G as herein ordained to be changed in location and the westernmost line of Avenue H.

Section 3. That East 25th street be vacated between the easternmost line of Avenue G as herein ordained to be changed in location and the westernmost line of Avenue H. 20

Section 4. That New street be vacated eastwardly from the easternmost line of Avenue G as herein ordained to be changed in location.

Section 5. That East 26th street be vacated between the easternmost line of Avenue G as herein ordained to be changed in location and the westernmost line of Avenue H. 30

Section 6. That East 27th street be vacated between the easternmost line of Avenue G as herein ordained to be changed in location and the westernmost line of Avenue H.

Section 7. That East 29th street be vacated eastwardly from the easternmost line of Avenue G as herein ordained to be changed in location. 40

Section 8. That all ordinances and parts of ordinances inconsistent herewith be and the same are hereby repealed.

Passed August 5th, 1890.

Approved August 9th, 1890.

JNO. NEWMAN,
Mayor.

Attest:

10 W. C. HAMILTON,
Clerk.

This is to certify that the above ordinances are true and correct copies of ordinances passed by the Mayor and Council of the City of Bayonne.

In witness whereof, I have hereunto set my hand and affixed the official seal of the City of Bayonne,
20 this 2d day of October, A. D. 1890.

[L. S.] W. C. HAMILTON,
[Seal of the City of Bayonne.] City Clerk.

STATE OF NEW JERSEY, ss.:

CHARLES W. FULLER, being duly sworn according to law on his oath, says that he is counsel for Mr.
30 Ralph G. Packard, the defendant in the above action; that he has read the affidavit of Charles A. Sterling sworn to on the 13th of October, 1890; that deponent was present at the meeting held at the office of said Sterling, in New York, and that as a result of said conference Mr. Packard was to make an estimate as to the cost of certain filling in, which price had to be determined before any agreement could be made to settle the matters between the complainant and defendant in this action. That
40 subsequently deponent saw Mr. Sterling, presumably on Friday, September 12th, and that said Ster-

ling at that time stated that Mr. Packard had not as yet submitted his figures, and also that said Sterling would leave town the next day to be gone for several days. That this deponent notified Mr. Packard of his (Sterling's) intention to be absent, and that deponent was subsequently informed by both Mr. Packard and Mr. Sterling that said Packard called at the office of said Sterling on the day that Mr. Sterling said he would return, and that Mr. Sterling was not there, not having yet returned from his trip. 10

Deponent further says that on the 6th day of May, A. D. 1890, on petition of Ralph G. Packard, was introduced in the Board of Councilmen of the City of Bayonne, an ordinance vacating several streets of said city, some of which had been open and some not; and that deponent told Mr. Sterling and his counsel that he would delay the passage of the ordinance as far as he could, pending the negotiations; 20 that deponent did delay the passage of said ordinance for a period of about three months, when, at the instance of the members of the Board of Councilmen themselves, the ordinance was passed, and this deponent was unable to delay it any further. Deponent denies that there was any agreement that Mr. Packard should abandon work on his projected improvement anywhere, except in the line of the right-of-way of the Bergen Neck Railway Company as located, and that, to deponent's knowledge, there was no work of 30 any kind done within the lines as aforesaid.

Deponent further says that Mr. Sterling and his counsel a number of times informed deponent that there would be no "snap game played" in an attempt to take possession of the property.

CHARLES W. FULLER.

Sworn to and subscribed before me, this 15th day of October, A. D. 1890.

JOHN H. PALMER,
Notary Public
of N. J. 40

State of New Jersey, ss. :

Ralph G. Packard, being duly sworn according to law upon his oath, says that he had read the affidavit of Charles A. Sterling sworn to on the 13th day of October, A. D. 1890; that on the 10th day of May, 1890, deponent sailed for Europe and was absent until the 1st of July following; that during deponent's absence certain maps were made showing
10 a re-location of the route of the Bergen Neck and the Kill von Kull Railways, which Kill von Kull is a branch scheme of the Bergen Neck Railway. That in the first interview, which was suggested by deponent's counsel, Mr. Sterling desired deponent to obtain definite prices for lands over which the proposed new route would be located, and this deponent, at the request of said Sterling, proceeded to get prices for different pieces of land not owned by him, which would be required to locate a new route, but
20 was unable to get definite terms until after September 6th, 1890. That subsequent thereto, deponent called upon Mr. Sterling at his office, to explain the reason of the delay, but Mr. Sterling was absent, and deponent was informed that he was out of the city. That definite arrangements for purchasing the property were not completed until the 24th of September, when this deponent in view of the progress made by the negotiation at that time signed a contract for the purchase of a large amount of property
30 aggregating the sum of twenty-one thousand dollars, and that deponent immediately thereafter made an engagement to meet Mr. Sterling on Friday, the 26th day of September, 1890; that deponent was unable to keep said appointment, and notified Mr. Sterling, and that the next day, Saturday, the 27th day of September, 1890, at eleven o'clock, was fixed upon, and that deponent faithfully kept such appointment.

Deponent further says that at no time since the
40 6th of May, 1890, has there been any work done within the lines of the right-of-way of the Bergen Neck Railway Company. That deponent's counsel,

Charles W. Fuller, told him that he had agreed that nothing should be done in that location; but deponent admits that a very large amount of work was done south and west of the lines of the right-of-way of the Bergen Neck Railway Company, as deponent was advised by his counsel he had a right to do.

R. G. PACKARD.

Sworn to and subscribed before me, this 15th day of October, A. D. 1890. 10

JOHN H. PALMER,
Notary Public of N. J.

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(Pages 88 to 92 omitted.)

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IN CHANCERY OF NEW JERSEY.

Between— THE BERGEN NECK RAILWAY COMPANY, Complt., and RALPH G. PACKARD, Deft.	On Bill and Cross Bill. On Rule to show cause. Order.

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The order to show cause granted herein on the twenty-ninth day of September, A. D. 1890, coming on to be heard upon bill, affidavits, and exhibits and answer and cross-bill and affidavits of the defendant and others, and counsel having heard, and the Court being of opinion that the injunction asked for by cross-bill should not be granted and the Court being also of opinion that an injunction should issue

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against the said Ralph G. Packard according to the prayer of the bill,

It is on this eighteenth day of October, A. D eighteen hundred and ninety, on motion of Dickinson & Thompson, solicitors of the complainant, ordered that an injunction do issue according to the prayer of the bill and that the injunction prayed for by the defendant in the cross-bill be denied.

ALEX. T. McGILL, 10
C.

Respectfully advised.
H. C. PITNEY,
V. C.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

Charles D. Thompson, being duly sworn according to law on his oath, says that he in one of the 20 firm of Dickinson & Thompson, solicitors of the complainant in this cause, that the injunction ordering this cause, bearing date the eighteenth day of October instant, was filed by his Honor Vice-Chancellor Pitney; that deponent was not informed of the filing of the order until too late to issue the injunction ordered under the rules of the Court, that deponent intended to issue the injunction promptly, and would have taken the injunction had he been informed in time of the filing of the order. 30

CHAS. D. THOMPSON.

Subscribed and sworn to this 24th day of October, A. D. 1890, before me.

WM. G. BUMSTED,
Master in Chancery
of New Jersey.

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IN CHANCERY OF NEW JERSEY.

Between— THE BERGEN NECK RAILWAY COMPANY, Complt., and RALPH G. PAKARD, Deft.	On Bill. Order.

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Upon reading the affidavit of Charles D. Thompson, it is on this twenty-fourth day of October, A.D. 1890, on motion of Dickinson & Thompson, solicitors of the complainant, ordered that an injunction do issue forthwith according to the terms of the order made herein, and bearing date the eighteenth day of October instant.

ALEX. T. McGILL, C.

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INJUNCTION.

NEW JERSEY, TO WIT:

[L. S.] The State of New Jersey to Ralph G. Packard, his servants and agents, and each and every of them. Greeting:

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Whereas, It has been presented to us, in our Court of Chancery, on the part of the Bergen Neck Rail-

way Company, complainant, that it has lately exhibited its bill of complaint against you, the said defendant, to be relieved touching the matters set forth in the said bill.

We therefore, in consideration of the premises, and of the particular matters set forth in the said bill, do strictly enjoin and command you, the said Ralph G. Packard, and all and every the persons before mentioned, and each and every of you, under 10 the penalty that may fall thereon, that you and every of you, do absolutely desist and refrain from grading East Twenty-eighth (28th) street, or any part thereof on the right-of-way of the Bergen Neck Railway Company, and from constructing a draw-bridge thereon, or interfering with the complainant in the construction of its railroad on the land mentioned in said bill until you, the said defendant, shall have fully answered the said bill of complaint, and our said Court shall make other order to the contrary. 20

Witness his Honor, Alexander T. McGill, our Chancellor, at Trenton, the twenty-fourth day of October, in the year of our Lord, one thousand eight hundred and ninety.

DICKINSON & THOMPSON,
Sol'rs.

Allan McDermott,
Clerk.

on October 21st 1890

Notice of appeal duly filed and not printed. 30

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IN THE COURT OF ERRORS AND APPEALS.

RALPH G. PACKARD, Appellant, and THE BERGEN NECK RAILWAY COMPANY, Respondent.	On Appeal.

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To the Honorable the Court of Errors and Appeals in the Last Resort in all causes:

20 The humble petition of Ralph G. Packard, the appellant in the above stated cause, respectfully shows:

That your petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Alexander T. McGill, Chancellor of New Jersey, bearing date the eighteenth day of October, in the year eighteen hundred and ninety, wherein the said The Bergen Neck Railway Company was complainant, and the said Ralph G. Packard was defendant, 30 in this respect, to wit: That the said order discharges an order to show cause why an injunction should not issue according to the prayer of the complainant's bill, and allows an injunction to the complainant, and denies an injunction to Ralph G. Packard as prayed by way of cross bill in his answer. And your petitioner humbly appeals from the whole of the said order, which ordered as aforesaid, upon the ground that the same is erroneous, for that the complainant was not entitled to any injunction as allowed, 40 and that Ralph G. Packard, the defendant, was entitled to an injunction as prayed for by way of cross bill, or that the status of things should be pre-

served by the order of said Court of Chancery until the final determination of said cause.

Your petitioner therefore prays that the said order of said Chancellor may be reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

CHARLES W. FULLER,
Solicitor for Appellant. 10
JOSEPH D. BEDLE,
Of Counsel with Appellant.

NEW JERSEY COURT OF APPEALS. 20

Between— RALPH G. PACKARD, Appellant, and THE BERGEN NECK RAILWAY COMPANY, Respondent.	On Appeal.

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The answer of the above named respondent to the petition of the appeal of the above named appellant.

This respondent, not acknowledging all or any of the matters which in the said petition of appeal are contained, to be true, for answer thereto, nevertheless, says that it admits, that an order was on the 40 eighteenth day of October last past, made and

entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to the substance and form thereof, this respondent prays to refer thereto when the same shall be produced.

And this respondent is advised and believes, that the said order is agreeable to equity, and it prays that the same may be affirmed with costs to be ad-
10 judged to this respondent.

DICKINSON & THOMPSON,
Solrs. and of Counsel
with the BERGEN NECK
RAILWAY COMPANY.

C. L. CORBIN,
of Counsel.

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OPINION.

THE BERGEN NECK RAILWAY COMPANY, v. RALPH G. PACKARD,	10

Order to show cause why injunction should not issue.

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Heard on bill, answer, cross-bill and affidavits.

Mr. C. L. CORBIN and Messrs. DICKINSON & THOMPSON for the complainant.

Governor BEDLE and Mr. C. W. FULLER for the defendant.

PITNEY, V. C.—The complainant, claiming to be 30 duly organized under the general railroad law, laid out a railroad along the margin of a stretch of salt marsh which skirts New York Bay, within the corporate limits of the City of Bayonne. In so doing it crossed lands of the defendant, of which it proposed to take about two acres. The defendant had previously planned a canal and basin for large vessels, to be excavated in the salt marsh, and extending therein some two thousand feet from the shore. This was to be reached by a channel dredged out to 40 the requisite depth through the shallows from deep water. The mouth of this canal or basin was crossed

by the complainant's proposed road, and the building of the road in the ordinary way would, of course, entirely obstruct it.

About January 1, 1890, the defendant had substantially completed his dredging in the shallows, and had commenced the excavation, in the salt marsh, of the bed of the canel. The complainant, being unable to settle with defendant, on January 11,
10 1890, applied to Judge Knapp for the appointment of commissioners. They were duly appointed on notice on January 22d. On February 3d they met, after notice, and viewed the premises, and on March 13th made their award. In the meantime defendant had proceeded with his excavation, and on February 3d, the date of the first meeting of the commissioners, was engaged in excavation on the land to be condemned, and on the 13th of March had entirely crossed it. The defendant appealed from the award, and the
20 appeal came on for trial at the Hudson Circuit Court April 30th, and was given to the jury May 2d. The railroad company, being called on at the trial so to do, declared that their plan and intention was to build a solid embankment across the proposed canal, and that they were willing that damages should be assessed accordingly, and the case was so put to the jury.

At the trial it appeared that the salt marsh, to be occupied by the defendant's proposed canal and
30 basin, was crossed by divers streets laid out, but not actually opened or used, and that the title to the bed three of these streets, viz.: East 25th, East 28th, and East 29th, had been acquired by the city by ordinance opening the same; whereupon, in instructing the jury on the subject of damages, the learned Judge told them that the defendant had no right to excavate for his canal and basin across the public streets, and that his project must be so far restricted, as that circumstance would restrict it, and that they should
40 assess their damages accordingly. The jury, nevertheless, found a verdict for $17,000, in place of an

award by the commissioners for $5,000. Judgment was not entered on the verdict until September 6th, the delay being due to negotiations for settlement between the parties.

On the 6th of May, four days after the verdict, the defendant petitioned the Mayor and Common Council of Bayonne, to vacate six streets of the city, where his proposed canal and basin would cross and occupy them. These six comprised all the streets interfered with by the canal and basin except East 28th street. This East 28th street, as laid out on paper, crosses the defendant's canal at the point where the complainant's railway crosses it. It crosses the canal almost at right-angles, but it cuts the line of the railroad at a very acute angle. With regard to this street the defendant, by his petition requested the Common Council not to vacate it, but to permit him to grade it from the westernmost limit of his land, to the westernmost side of his canal and basin, and to build and maintain a draw-bridge, not over twenty-five feet wide, on the line of the street, and across the canal. The result of a draw-bridge at the point described would substantially defeat the construction of the complainant's road. This petition was acted upon by the Common Council the same evening, without any notice whatever, and a resolution was adopted in precise accordance with the defendant's prayer in his petition. In fact, the counsel for the defendant in his litigation with the complainant, was also the stated counsel of the municipality. Negotiations for a settlement between the parties were had, extending from the date of the verdict to late in September, without result. On the 26th of September the complainant filed its bill in this Court, properly verified, setting out the condemnation proceedings and award, verdict and judgment thereon, and also that the land condemned was subject to certain mortgages and other incumbrances, and asking for leave to pay the money into Court under the provisions of the second section of

the act of March 9, 1877, (P. L. 137; Supplement to the Rev. p. 128.) Upon filing this bill, an order was made for paying the money into Court, and it was done on September 27th. Such payment included interest and costs. Notice was given to the defendant of this payment, and he at once brought his writ of error to the Court of Errors and Appeals to review the judgment of the Circuit Court. On
10 the 29th of September, complainant filed another bill, setting out the facts as hereinbefore stated, and that the defendant proposed to grade 28th street, and to construct a draw-bridge over his canal, all within the limits of the land taken and condemned by the proceedings in question, and praying an injunction. Upon filing this last bill, with affidavits, and upon exhibits shown, an order was made that the defendant show cause, on a day named, why the injunction should not issue. The defendant filed his answer, combined with a
20 cross-bill, by which he set up several defences to complainant's equity, to be specifically noticed hereafter, and by his cross-bill set out in full the nature and extent of his proposed canal and basin, claimed that the complainant's railroad, constructed as proposed, would ruin the enterprise, render all the moneys expended a complete loss, and for these reasons that the conduct of the complainant, in so constructing their road, was a wanton and unwarranted exercise of a
30 statutory power, which should be restrained by this Court, and praying that complainant might be restrained from crossing his canal except by a draw-bridge, and from crossing East 28th street except by an overhead crossing.

The motions for and against injunctions on either side were argued at great length by the defendant's counsel and decided by me at once. I am now asked to state my reasons for use on appeal.

The first point made by the defendant was that
40 the complainant's charter had expired, and that its franchise was lost by failure to do certain acts with-

in the time limited by the act. I held that the defendant should have taken this objection by proceeding at law by certiorari, and could not be heard upon it in this Court, especially after award made and money paid into Court.

The second point was that the proofs showed, that there was an understanding, that, pending the negotiations for a settlement, no legal steps should be taken by either to the prejudice of the other, and that defendant had delayed suing out his writ of error, relying upon it, and that the suing out of that writ of error stayed the defendant's right to proceed to pay the money, and take possession. I held that the defendant was entitled to stand before the Court precisely as he would have done, if he had sued out his writ of error *instanter* the judgment was entered on the verdict. But I also held that the writ of error did not in any degree affect the complainant's right to take possession, upon paying the amount found by the jury. The 12th section of the General Railroad Act (Rev. p. 928, para. 100) provides that upon paying the amount awarded by the commissioners, the railroad company shall be entitled to enter, etc. The legislature might have stopped here, and given an appeal from the award without staying the right to take possession. Such provision was made in many of the old special charters, and is found in Section 7 of the General Water Works Act (Rev. p. 1366, para. 44), and I venture the suggestion that such was the intention of the draftsman of the General Railroad Law, but his language has been, very properly, of course, construed otherwise, and it has been held that the provisions of Section 13, (Rev. p. 929, para. 101) postponed the right of possession in case an appeal be taken before payment, until after verdict. *Johnson v. R. R.*, 18 Stew. 454. But there is nothing in the nature and effect of a writ of error to stay the complainant's right. It will not stay execution of an ordinary judgment unless bail be given. Here, the legislature

has declared, that, upon paying the verdict, the railroad company shall have the right to enter, etc., and it nowhere says that such right shall be stayed by a writ of error.

The third point was, that the payment of money into court was nugatory. It was not denied that the incumbrances, or some of them, exist as set out in first bill, and that it was a proper case for such pay-
10 ment under the 2nd section of the Act of March 9, 1877 (P. L. 137; Supplement to the Rev. p. 128,) but it was contended that that section did not apply to the case of an appeal, as here, to the Circuit Court, but only to cases where appeals were originally limited to the Court of Common Pleas, mentioned in the first section.

I think this altogether too narrow a view, and that it would, in effect, quite nullify the section in question, since notoriously, the number of cases to which
20 it could apply is extremely small. In short, I deem it absurd to adopt such construction. Counsel on this point contended that complainant had not progressed far enough with its suit to entitle it to the benefit of the payment into Court. But I fail to see any force in this point. What more could it do? Certainly it is not to wait until all parties are brought in by process, and the title to the money, as between them, is settled. The statute is imperative that payment into Court, and notice, shall
30 have the effect of actual payment. The money so paid into Court is put beyond the power of the R. R. Co., and within the immediate grasp and reach of the parties actually entitled to it, and such payment satisfies the demands of the constitution. Such a payment is clearly distinguishable from that under review in *Redman v. R. R. Co.*, 6 Stew. 165. The payment there was made into Court under the last clause of the 13th section of the Act, (Rev. p. 929, para. 101) with an order "directing that
40 it shall remain there to abide the result of the appeal, or the further order of the Court," showing that it

was not to be within the immediate and unfettered reach and grasp of the landowner, but that the R. R. Co. still retained a right in it. And it is this feature that distinguishes that case from the one in hand, where, as before remarked, the money is put beyond the reach and control of the R. R. Co. and within the immediate and unfettered reach of the real landowner.

The learned Vice Chancellor in reviewing the clause of the Act in question in *Redman v. R. R. Co.* evidently understood that the legislature by providing for the payment into Court by the R. R. Co. in case of of appeal, did not intend to put the money within the immediate reach of the landowner, but to impound it in Court, pending the appeal; and it was against the clause, as so construed, that his judgement was aimed. If such is not the proper construction of that last clause—if under it the landowner could have come at once to the Court, and demanded the money without regard to the appeal, then I should say that the learned Judge's argument was unsound and his conclusion erroneous.

The fourth point was that the crossing is over a street in a city at grade, and forbidden by the Statute, (Sec. 14; Rev. p. 929 and 930, para. 102), which provides "that in case said railroad shall cross any "street or highway *in* any city, it shall be either "above or below the grade thereof, at such distance "as shall not interfere with the free and uninter- "rupted use of *said streets or highways.*" The point of crossing here is a salt marsh, impassable by horses or vehicles, many hundred feet from any high ground, or human habitations or roads, and is near the margin of the bay. There is not the least appearance of a street or highway, anywhere in the neighborhood. It exists as a street, wholly on paper. If it were necessary to decide the question, I should be inclined to hold that the statute did not prohibit the building of a railroad at the point in question at what is called grade. But I did not find

it necessary to decide it, since I considered that it was not competent for the defendant to raise the point. All his right, title and interest in the *locus* was taken by the condemnation proceedings. In the present condition of affairs, he was not specially injured by obstructing the street at the point in question. Such obstruction did not hinder him from reaching his
10 premises, and even if it did, I am of the opinion that the clause above quoted can only be invoked by the municipality itself, and so long as it does not complain, individuals may not. At any rate, it seems to me that the defendant could not do so under the circumstances next to be mentioned.

The fifth point taken was that the proposed filling up of the canal, and construction of a railroad across it, would prevent the construction of the drawbridge, and the grading provided for by the resolution of
20 the Common Council passed May 6th, and above referred to. Counsel for the complainant contended, and I think rightly, that this resolution was absolutely void, and not merely voidable, for the reason that the charter of Bayonne requires that such action must be taken by ordinance. *State v. Bergen*, 4 Vr. 72; *State v. Bayonne*, 6 Vr. 233; *State v. Lambertville*, 16 Vr. 279, 282. Counsel for defendant attempted to distinguish the case of a contract to build a drawbridge, from a provision for opening and grading a
30 street, but I am unable to follow him. The inception of the affair—the adoption of a drawbridge, as part of the street—must, as it seems to me, be by ordinance. It seemed to me at the time, and I am still of the opinion, that if the municipality is required by its charter to proceed by ordinance, and attempts to proceed by resolution, its action is simply void, quite as much so as would be a joint resolution of the legislature altering the canons of descent, or creating a new misdemeanor. The constitu-
40 tion has directed how the legislature shall proceed to enact laws, and any attempt to enact them in any

other mode is a simple nullity. So with a municipality—when its charter has directed a particular mode of proceedure, in dealing with certain subjects, that mode must be followed, or the action is unauthorized, and has no more force than similar action by any like number of ordinary citizens. But beyond and above the point that the action in question was by simple resolution, I thought at the hearing, and still think, that the circumstances under which, and the evident purpose with which the resolution was adopted, rendered it inequitable for the defendant to set it up against the complainant. It was palpably a proceeding set on foot by the defendant, not in the interest of the public, or to secure any public purpose, but to enable him to defeat the railroad company in constructing their road, the right to construct which, in the manner proposed, they had acquired, as against him, by due course of law, and had come under obligation to pay to him damages assessed upon the basis of an utter destruction of his whole project. He had obtained a verdict, and was entitled to a judgment against the railroad company for damages, based upon the complete filling up and obstruction of the canal at the point in question, and then proceeded at once to procure such action on the part of the Common Council as would, if successful, enable him to construct his canal, and prevent the complainant from enjoying the right it had come under irrevocable obligation to pay him for, and from building its road at all, except at an enormously increased expense. His object in procuring the vacation of all the streets, except East 28th street, is manifest. That street alone crossed the railroad on the land taken from him. Complainant by the verdict acquired a vested right, as against the defendant, to cross the canal and street in the manner proposed, viz.: by a solid filling, and at grade. It was not competent, as it seems to me, for the defendant to divest that right by the means invoked. That such was the object of the proceedings

of the Common Council was admitted by counsel for the defendant, and attempted to be justified by the gravity of the situation. I think it cannot succeed. It seemed to me at the hearing, that the whole proceedings of the Common Council in reference to the affair, was nothing more or less than an abuse and a prostitution of their powers, to the advancement of the private interests of a single in-
10 dividual, and to the detriment of the complainant, and for that reason, as well as the other, they were not binding on the complainant. Over and above, and beside all this, is the lack of notice. The act was a judicial one, and notice lies at the base of all judicial actions, *State vs. Morristown*, 5 Vr. 445.

The last point taken arises out of the prayer for an injunction by the defendant in his cross-bill. He alleges that the crossing of his canal by a solid filling resulting, as it will, in a complete destruction of the
20 enterprise, is a wanton and inequitable use of the statutory power invested in the complainant, and should be restrained by this Court.

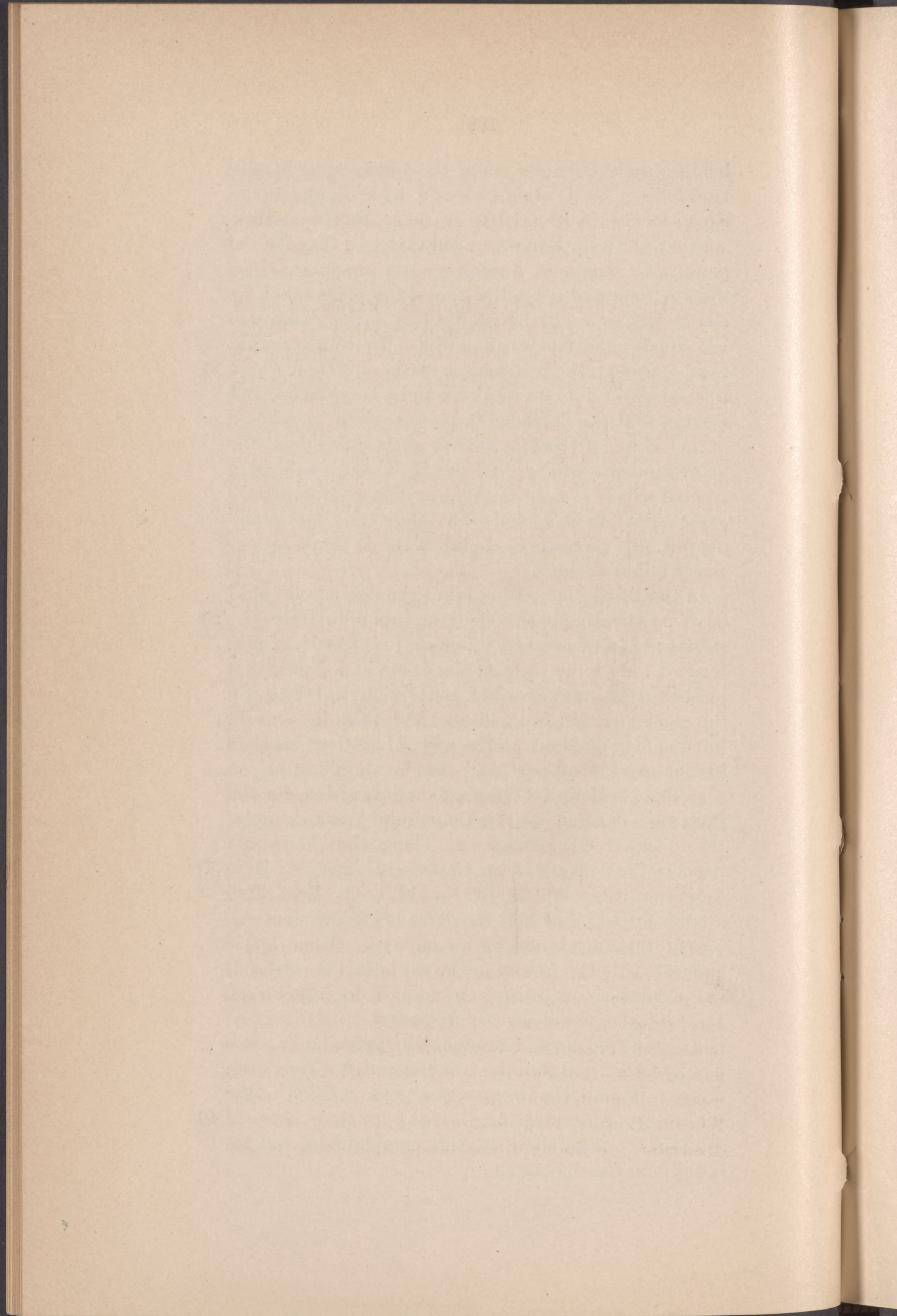
Several answers were made at the argument to this point. First, that it is a matter which might, and should have been tested in another tribunal, at an earlier stage of the proceedings. The Supreme Court has complete, if not exclusive jurisdiction of that subject, by means of its writ of certiorari. *Olmstead v. Aqueduct Co.*, 17 Vr. 495; 18 Vr. 311;
30 *United Companies v. National Docks R. R. Co.*, 23 Vr. 90, are instances of the exercise of the supervisory power of the Supreme Court over such matters.

In the second place, it did not appear to my satisfaction that the allegations of the answer were sustained by the proofs; certainly not to a degree sufficient to warrant a preliminary injunction. The cost of the defendant's canal at the date of the award was not shown, nor was any estimate made or offered, of how much more it would
40 cost complainant to erect and maintain a drawbridge at the point in question, than to cross, by a solid filling. It did not appear but that the cost of a draw-

bridge would be more than the whole value of defendant's project, even after he had obtained the right from the municipality to cross the streets. Neither did it appear to my satisfaction, that the expenditures made in dredging out a channel across the shallows and up to the line of the piece taken by the R. R. Co. would be wholly lost if the canal was not constructed farther than that. There was ample room between the railroad, and the outside wharf 10 line, to build docks and piers, and a large basin, and I think that the defendant's plan showed a scheme of that kind. I thought that to sustain this point the defendant must show, that the R. R. Co. could by a comparatively small outlay, save a comparatively great injury to him, and that they improperly and inequitably refused to do it. This I think he entirely failed to show.

In the third place, I held that the defendant could have no standing in this Court on this point unless he 20 submitted to terms, and this he refused to do. Those terms I held to be at least the following: First, that he should give up the verdict, and all right to damages in the condemnation proceedings, and that he should put the complainant in the way of getting back its $17,000 paid into Court, and that he should stipulate to accept, in lieu of damages to be awarded by the jury, such damages as this Court might award under the changed circumstances. Then, that he should procure the consent of the Common Council of Bay- 30 onne that the complainant should cross East 28th street at grade, and that the draw-bridge scheme for a road crossing should be abandoned. Other terms suggested themselves to my mind, but as the defendant showed no disposition to submit to any terms, the subject was not further discussed.

For these reasons I thought the defendant's case wholly failed, and that the complainant, having shown a clear title to the *locus in quo*, was entitled to the uninterrupted enjoyment of it, and for that reason I 40 granted the injunction to the complainant, and refused it to the defendant.



Articles of Association of the Bergen Neck Railway Company.

We, the undersigned, William H. Barnes, Joseph D. Potts and Henry H. Houston, residing at Philadelphia, in the State of Pennsylvania; Charles M. Johnson and Charles A. Sterling, residing at Orange, New Jersey; James A. Hand and William H. Baxter, residing at Elizabeth, New Jersey; do hereby associate together under and in pursuance of the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act to authorize the formation of railroad corporations and regulate the same," approved April 2d, 1873, and of the several acts supplementary thereto and amendatory thereof, to form a railroad corporation or company for the purpose of constructing, maintaining and operating a railroad for the public use in the conveyance of persons and property, and we do make and sign the followingas the Articles of such corporation or company.

I. The name of such corporation or company shall be "The Bergen Neck Railway Company."

II. The said company shall continue fifty years.

III. The railroad to be constructed, maintained and operated by said company is to extend from a point on the main line of the National Dock Railway Company fourteen hundred and twenty-eight feet and forty-four one-hundredths (1428 44-100 ft.) measured on the center line of said railway from the westerly line of Communipaw Ave., in Jersey City, Hudson County, New Jersey, then in a southw sterly direction for about three miles and seven-tenths

(3 7-10) then in a southeasterly direction for about one and four-tenths (1 4-10) miles to a point in the established shore or solid filling line of the Kill von. Kull Branch number one begins at a point in the above described main line six thousand eight hundred and sixty-nine feet and forty-eight one-hundredths (6869 48-100) southwesterly from the first above described beginning point, then in a
10 southeasterly and northeasterly direction four thousand two hundred and thirty-nine feet and thirty-three one-hundredths (4239 33-100) to and into the property of the National Storage Company.

Branch number two begins at a point in the above described main line twenty-three thousand six hundred and thirty-five feet and fifty-eight one-hundredths (23,635 58-100 ft.) southwesterly and southeasterly from the first above described beginning point, then in a southwesterly direction three thou-
20 sand two hundred and seventeen feet and 01-100 (3217 01-100) to a point in the established shore or solid filling line of the Kill von Kull.

The length of the said railway is to be nearly seven miles, and is intended to be located and constructed entirely in the County of Hudson of the State of New Jersey, and the principal office of said company is to be in Jersey City, New Jersey.

30 IV. The amount of the capital stock of the said company is to be seventy-five thousand dollars to be divided into and consist of seven hundred and fifty shares of the par value of $100 each

V. The following are the names and places of residence of seven directors of said company who shall manage its affairs for the first year or until others are chosen in their places, to wit:

William H. Barnes, residing at Philadelphia, Pa.
40 Joseph D. Potts, residing at Philadelphia, Pa.
Henry H. Houston, residing at Philadelphia, Pa.

Chas. A. Sterling, residing at Orange, New Jersey.
Chas. M. Johnson, residing at Orange New Jersey.
James A. Hand, residing at Elizabeth, New Jersey.
William H. Baxter, residing at Elizabeth, New Jersey.

VI. The undersigned do severally subscribe these articles of association and agree to take the number of shares of the capital stock of said company set opposite their respective names, and add thereto their respective places of residence.

Dated at Jersey City, July 15th, 1885.

NAME.	RESIDENCE.	NO. OF SHARES SUBSCRIBED.
W. H. Barnes,	Philadelphia,	Seven hundred and thirty-two.
Jos. D. Potts,	Philadelphia, Pa.,	Three shares.
H. H. Houston,	" "	Three shares.
Chas. A. Sterling,	Orange, N. J.,	Three shares.
James A Hand,	Elizabeth, N. J.,	Three shares.
C. M. Johnson,	Short Hills, N. J.,	Three shares.
W. H. Baxter,	Elizabeth, N. J.,	Three shares.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

Be it remembered that on the seventeenth day of July, A. D. 1885, before me, Sidney Ward, a Commissioner of Deeds of the State of New Jersey, residing in the State of New York, personally came Charles A. Sterling, James A. Hand, Charles M. Johnson, and William H. Baxter, who I am satisfied are four of the persons mentioned and described in the foregoing instrument, and who executed the same, and I having first made known to them the contents thereof, they and each of them did acknowledge that they severally signed, sealed and executed the same as their voluntarily act and deed for the uses and purposes therein

expressed, to be recorded pursuant to the statute therein recited.

Witness my hand and official seal.

SIDNEY WARD, (SEAL.)
A Commissioner of Deeds
for the State of New Jersey,
in the State of New York.

10

STATE OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA. } SS.:

Be it rembered that on this sixteenth day of July, in the year of our Lord 1885, before me the subscriber, James Crowe, a commissioner for the State of New Jersey, residing in the City of Philadelphia, in the State of Pennsylvania, personally appeared William H. Barnes, Joseph D. Potts and Henry H. Houston, who I am satisfied are three of the persons
20 mentioned and described in the foregoing instrument and who executed the same, and I having first made known to them the contents thereof, they and each of them, did acknowledge that they severally signed, sealed and executed the same as their voluntary act and deed for the uses and purposes therein expressed, to be recorded pursuant to the statute therein recited.

In testimony whereof I have hereunto set my hand and seal the day and year first above written.

30

JOS. D. POTTS,
H. H. HOUSTON,
W. H. BARNES.

JAMES CROWE, [SEAL.]
Commissioner of Deeds
for New Jersey, at
400 Chestnut street,
Phil. Pa.

STATE OE NEW YORK, }
40 CITY AND COUNTY OF NEW YORK, } SS.:

On the seventeenth day of July, A. D. 1885, before

me, Sidney Ward, a Commissioner of Deeds for the State of New Jersey, residing in the State of New York, personally came Charles A. Sterling, James A. Hand, Charles M. Johnson and William A. Baxter, four of the directors named in the foregoing articles of association of the Bergen Neck Railway Company," who being severally duly sworn, each for himself deposes and says that he is one of the directors named in the said articles of association, 10 that the amount of capital stock of said company required by law, to be subscribed thereto and paid in good faith, to wit, at least two thousand dollars of stock for every mile of road proposed to be made by said company, has been in good faith subscribed and paid in cash to the directors named in said articles of association, and that it is intended in good faith to construct and maintain and operate the railroad mentioned in said articles of association. And deponents further say that the whole of the capital 20 stock of said company has been in good faith subscribed, and fourteen thousand dollars thereof, has been paid in good faith and in cash to the directors named in said articles of association.

CHAS. A. STERLING,
JAS. A. HAND,
C. M. JOHNSON,
W. H. BAXTER.

Severally subscribed and sworn before me this 17th day of July, 1885, } 30

Witness my hand and official seal,

SIDNEY WARD, [SEAL.]
A Commissioner of Deeds
for the State of New Jersey
in the State of New York.

STATE OF PENNSYLVANIA, } ss.:
COUNTY OF PHILADELPHIA, }

On this eighteenth day of July, 1885, before me, 40 James Crowe, a Commissioner of Deeds for the State

of New Jersey, residing in the State of Pennsylvania, personally appeared William H. Barnes, one of the directors named in the foregoing articles of association of the Bergen Neck Railway Company, who, being by me duly sworn, deposes and says, that he is one of the directors named in said articles of association; that the smount of capital stock of said company required by law to be subscribed thereto and
10 paid in good faith, to wit, at least two thousand dollars of stock for every mile of road proposed to be made by said company, has been in good faith subscribed and paid in cash to the directors named in said articles of association, and that it is intended in good faith to construct and maintain and operate the railroad mentioned in said articles of association, and deponent further says that the whole of the capital stock of said company has been in good faith subscribed and fourteen thousand dollars there-
20 of has been paid in good faith and in cash to the directors named in said articles of association.

W. H. BARNES.

Subscribed and sworn to before me this 18th day of July, A. D., 1885.

Witness my hand and official seal.

James Crowe, (seal.)
Commissioner of Deeds
for New Jersey,
30 at 400 Chestnut St., Phila., Pa.

State of New Jersey.

Trenton, July 20th, 1885.

I hereby certify that I have received from the Directors of the Bergen Neck Railway Company, named in the foregoing articles of association, the sum of fourteen thousand ($14,000) dollars deposited with me under the provisions of Chap. XII. of the Laws of
40 1878, as amended by Chapter 53 of the Laws of 1879, being ($2,000) two thousand dollars per mile for a

railroad proposed to be constructed by said company under said articles.

$14,000. JOHN J. TOFFEY,
State Treasurer.

(ENDORSED.)

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Received in the Office of the Secretary of State July 20, 1889, and recorded in Book F. of Incorportions, page 585, &c.

HENRY C. KELSEY,
Secretary of State.

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AMENDMENT TO ARTICLES OF ASSOCIATION OF THE BERGEN NECK RAILWAY COMPANY.

Whereas, We, the undersigned, William H. Barnes, Joseph D. Potts, Henry H. Houston, Charles M. Johnson, Charles A. Sterling, James A. Hand, and William H. Baxter, did, on the 20th day of July, 1885, file in the office of the Secretary of State of the State of New Jersey articles of association of the Bergen Neck Railway Company; and 30

Whereas, In said articles of association Charles M. Johnson, one of the incorporators, is described as residing at Orange, in the State of New Jersey, and is named as one of the directors of said company and as residing at said Orange, New Jersey; and

Whereas, In fact, the said Charles M. Johnson resides at Short Hills, in the State of New Jersey; 40

Now therefore, We do hereby amend said articles of association by stating that the residence of the

said Charles M. Johnson is at Short Hills, in the State of New Jersey, and not at Orange, in said State.

Dated, Jersey City, August 3, 1885.

CHAS. A. STERLING,
C. M. JOHNSON,
JAS. A. HAND,
W. H. BAXTER,
JOS. D. POTTS,
10 W. H. BARNES,
H. H. HOUSTON.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } SS.:

Be it remembered that on this 14th day of August, in the year one thousand eight hundred and eighty-five, before me, James Crowe, a Commmissioner of Deeds for the State of New Jersey, residing in the 20 State of Pennsylvania, personally appeared William H. Barnes, Joseph D. Potts and Henry H. Houston, who I am satisfied are three of the persons named and described in and who executed the foregoing instrument in writing, and I having first made known to them the contents there f, they did severally acknowledge that they signed, and executed the same as their voluntary act and deed for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand 30 and official seal this 14th day of August, 1885.

JAMES CROWE, [SEAL.]
Commissi ner of Deeds
for New Jersey,
a 400 Chestnut St., Phila., Pa.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } SS.:

40 Be it remembered that on this 23rd day of October in the year one thousand eight hundred and eighty-

five, before me Sidney Ward, a Commissioner of Deeds for the State of New Jersey, esiding in the State of New York, personally appeared Charles A. Sterling, James A. Hand, Charles M. Johnson and William H. Baxter, who I am satisfied are four of the persons named in and described in and who executed the foregoing instrument in writing, and I having first made known to them the contents thereof, they did severally acknowledge that they signed and executed the same as their voluntary act and deed for the uses and purposes therein expressed.

In witness whereof, I have hereunto set my hand and official seal this 23rd day of October, 1885.

SIDNEY WARD, [SEAL]
A Commissioner of Deeds
for the State of New Jersey.